Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

BURLE B. BEARD,

Petitioner,

v.

DAN BAUM, HAROLD CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN C. SISK, CAROLINE VENUSTI, and the STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The Alaska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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195 pp

QUESTIONS PRESENTED

1. Is the Alaska Supreme Court's final holding – that 42 U.S.C. § 1983 claims are subject to a defense of failure to exhaust administrative procedures – contrary to *Patsy v. Bd. of Regents of Florida*, 457 U.S. 496, 73 L.Ed.2d 172 (1982), expanded to cover § 1983 claims brought in state courts by *Felder v. Casey*, 487 U.S. 131, 101 L.Ed.2d 123 (1988)?

2. May a state procedural rule excuse a state court from applying the clearly established rule of federal law – that failure to exhaust administrative procedures is not a defense to 42 U.S.C. § 1983 claims – when the federal rule was raised and briefed in the first of three appeals to the highest state court and when the federal rule was raised again on the third appeal to defend a judgment in § 1983 claimant's favor pursuant to a well-established and otherwise consistently applied state procedural rule, that the highest state court should and will consider any matter appearing in the record in defense of a judgment, even if the matter was not raised by the parties or relied on by the trial court?

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II. ALASKA'S "FAILURE TO BRIEF CONSTITUTES WAIVER" RULE OF PROCEDURE SHOULD NOT BE ALLOWED TO DEFEAT BEARD'S § 1983 CLAIMS WHEN PLAINTIFF/APPELLEE CITED *PATSY v. BD. OF REGENTS* FOR THIS HOLDING IN HIS FIRST BRIEF TO THE STATE SUPREME COURT AND IT WAS AN ALTERNATIVE GROUND TO AFFIRM SPECIFICALLY BROUGHT TO THE COURT'S ATTENTION IN BEARD'S PETITION FOR REHEARING 11

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PETITION FOR WRIT OF CERTIORARI

Burle B. Beard respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of the State of Alaska entered in this proceeding on May 29, 1998, in order to resolve the conflict between the Supreme Court of the State of Alaska and the Supreme Court of the United States on whether exhaustion of state administrative remedies is a defense to § 1983 claims.

OPINIONS BELOW

This case has been the subject of four Alaska Supreme Court opinions, three appeals and one opinion on rehearing. The opinions are reprinted in the appendix hereto as indicated below. Citations to these opinions, in sequence, are:

1 *Burl (sic) B. Beard v. Dan Baum, Harold A. Cameron, Sharon McLeod, William B. McMullen, Stephen C. Sisk and Caroline C. Venusti, Individually and as employees of the State of Alaska; and the State of Alaska*, 796 P.2d 1344 (Alaska 1990). (*Beard I*) App. 114-132.

2 *Harold A. Cameron, Sharon McLeod, William B. McMullen, and Caroline Venusti, individually and as employees of the State of Alaska; and the State of Alaska v. Burle B. Beard*, 864 P.2d 538 (Alaska 1993). (*Beard II*) App. 79-113.

3 *State of Alaska, Caroline Venusti and William McMullen v. Burle S. (sic) Beard*, 948 P.2d 1376 (Alaska 1997). (*Beard III*) App. 47-78.

4 *State of Alaska, Caroline Venusti and William McMullen v. Burle S. (sic) Beard*, ___ P.2d ___,

1998 WL 271248, 158 L.R.R.M. (BNA) 2538 (Alaska May 29, 1998) (NO. S-6378, S-6438) (*Beard IV*, being *Beard III* revised on Rehearing) App. 1-33.

JURISDICTION

On November 28, 1997, the Alaska Supreme Court issued its opinion in *State of Alaska, et al. v. Burle S. (sic) Beard*, 984 P.2d 1376 (Alaska 1997) (*Beard III*), reversing all judgments based on a jury verdict which found that the individual defendants had violated Beard's 42 U.S.C. § 1983 (Free Speech) rights and the State had constructively discharged him. Beard timely petitioned the Alaskan court for rehearing on December 2, 1997, which was accepted and decided on May 29, 1998, refusing to change the result. This petition has been filed within 90 days of that denial, as required by Supreme Court Rule 13.3.

The jurisdiction of the court is invoked pursuant to 28 U.S.C. § 1257.

STATUTES INVOLVED IN THIS CASE

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

U.S. Constitution, Amendment I provides:

Freedom of religion, of speech, and of the press.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.

STATEMENT OF THE CASE

Burle Beard was a nineteen-year employee of the Alaska Department of Transportation (DOT) with acceptable to outstanding evaluations until 1985, when he became a union representative and, believing it his duty, reported the falsification of time sheets and leave slips by some supervisors and co-workers to cover up the routine misuse of State time and property.

Caroline Venusti, the DOT personnel director in the regional office, arranged for Beard to meet with William McMullen, the DOT regional director. McMullen had an in-house investigation done, which found no wrongdoing by the people Beard had reported. Beard described this investigation as a "whitewash" and told McMullen he intended to continue seeking a competent, objective investigation. For this reason, McMullen, with help from

Venusti and Cameron, an intermediate level supervisor, began a campaign of criticism, poor performance evaluations and false accusations of wrongdoing, all intending to develop a pretext on which to fire Beard or drive him to quit. After a year of this mistreatment, and unable to stop it with a series of union grievances and appeals to management, Beard quit.

A jury found this pattern constituted (1) constructive discharge by the employer, State DOT, (2) 42 U.S.C. § 1983 violations of Beard's Free Speech rights by the individual defendants, and (3) intentional infliction of emotional distress, all motivated in the individual defendants' retaliation for Beard's reporting and seeking an investigation of the wrongdoing.

Proceedings before the trial in 1991, following pleading and motion practice, included the trial court dismissal of several of Beard's claims, including the constructive discharge claim, on the grounds that Beard failed to exhaust administrative remedies, *Beard v. Baum, et al.*, 796 P.2d 1344, 1348 (Alaska 1990) (*Beard I*), App. 118, and the grant of summary judgment for the individual defendants on Beard's § 1983 claim. *Id.* Beard appealed to the Alaska Supreme Court.

Beard's brief in the first appeal asserted that § 1983 plaintiffs need not exhaust state administrative remedies as a prerequisite to bringing a § 1983 claim and cited

Patsy v. Board of Regents, 457 U.S. 496, 73 L.Ed.2d 172 (1982), for its no exhaustion holding.[1]

When the Alaska Supreme Court decided *Beard I*, it recognized Beard's § 1983 claim and discussed it as such, stating that it was dependent on the resolution of his constructive discharge claim, *id.*, at 1351-1352, n. 8; App. 126, reversed the trial court's dismissal of Beard's claims and remanded them for trial. *Id.*, at 1349; App. 120. However, it did not address Beard's contention that § 1983 claimants are not subject to failure to exhaust remedies, but, in addressing Beard's constructive discharge claim, held for Beard on the alternative ground that Beard had

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[1] Beard's *Brief of Appellant* (opening) in *Beard I* stated:

ARGUMENT

I. THE SUPERIOR COURT ERRED BY RULING THAT THE COLLECTIVE BARGAINING AGREEMENT PROVIDES BEARD'S EXCLUSIVE REMEDY [App. 162]

. . . .

. . . *Loudermill* demonstrates the availability of relief for constitutional violations under Sec. 1983 and that relief is available even without an exhaustion of alternative remedies, for Loudermill brought his Sec. 1983 action even though "the commission's decision was subject to judicial review in the state courts," *see* 470 U.S. at 536.

The circuit court in *Loudermill* specifically had ruled that there is no judicial exhaustion requirement in Sec. 1983 cases. *See Loudermill v. Cleveland Board of Education*, 721 F.2d 550, 555 (6th Cir. 1983), *rev'd on other grounds*, 470 U.S. 532 (1985); *see also Patsy v. Board of Regents*, 457 U.S. 496, 502 (1982). . . . [App. 164]

established futility as an excuse for exhaustion. 796 P.2d at 1349; App. 120.

This holding was believed to be final by Beard, the Superior Court on remand, and by the dissenting Alaska Supreme Court Justice in the two subsequent appeals, *Cameron v. Beard*, 864 P.2d 538 (Alaska 1993) *(Beard II)* and *Beard III*, following trial. The *Beard I* holding stated:

> Beard is excused from grieving his constructive discharge and intentional infliction of emotional distress claims under the CBA because Senkow, his union representative, refused to file a grievance for Beard's allegations of harassment underlying these claims on Beard's behalf. [App. 119]
>
> . . . .
>
> . . . Beard could not comply with the grievance procedures established by the CBA because his union representative refused to represent him. Any such attempt would have been futile. Under these circumstances, we **hold that Beard in excused from exhausting** his administrative remedies under the CBA for his claims of constructive discharge and intentional infliction of emotional distress.
>
> (Emphasis added).
>
> [796 P.2d 1344, 1349] [App. 120]

After remand, the case was tried to a jury in 1991. The jury found for Beard and against the State and individual defendants, recognizing that Beard's employee supervisors retaliated against him for criticizing his government, thereby causing his constructive discharge. *See Special Verdict*, App. 43-46. The *Beard I* court found this to

be First Amendment protected speech. 796 P.2d at 1352-53; App. 129. This ruling never changed.

The jury also found the individual defendants liable for violating Beard's Free Speech rights by engaging in a pattern of retaliatory harassment. *Special Verdict, id.* The defendants appealed, producing *Beard II.*

In the second appeal, the Alaska Supreme Court dealt with a variety of defenses and claims of error raised by Defendants and affirmed all the findings and the verdicts against the State, McMullen and Venusti, but reversed, as speculative and circumstantial, a $1,000.00 punitive award against individual defendant McLeod, and the $1,000.00 compensatory and $45,000.00 punitive award against defendant Cameron. 864 P.2d at 549-550; App. 103-104.

The Alaska Supreme court specifically recognized that the evidence supported the constructive discharge verdict. 864 P.2d 538, 548; App. 100. However, the Court, over Justice Compton's vigorous dissent, overruled their prior holding in *Beard I* on the exhaustion issue. *Id.*, at 545; App. 92. *See also id.*, at 551-53 (Compton, J., dissenting); App. 109-113. The fact issue of whether Beard had established futility as an excuse for exhaustion with respect to his constructive discharge claim was remanded to the trial court for an "evidentiary hearing" meaning, in Alaska parlance, not before a jury. Again, the Alaska Supreme Court failed to address binding federal authority holding that a § 1983 plaintiff (whose claims were now proven) is not required to exhaust state administrative remedies. It had, however, cited *Patsy* and *Felder v. Casey*, 457 U.S. 496, 73 L.Ed.2d 172 (1982), in its 1991 decision in

Diedrich v. City of Ketchikan, 805 P.2d 362, 368 (Alaska 1991), but held that Diedrich had lost his § 1983 claims on collateral estoppel grounds by participating in a personnel board hearing some 15 months prior.

After remand following *Beard II*, the trial court held the evidentiary hearing and found that Beard was excused from filing any more grievances because all of the evidence on this issue had proven futility,[2] Defendants appealed.

On this third appeal, the Alaska Supreme Court reversed the trial court's findings as "clearly erroneous."[3] *Beard III*, 948 P.2d 1376 (Alaska 1997); App. 61. Again, the Alaska Supreme Court failed to acknowledge that § 1983 plaintiffs are not required to exhaust state administrative remedies, even though binding federal authority was cited in *Beard I*.

Beard promptly petitioned the Alaska Supreme Court for rehearing, specifically reiterating that Beard was not required to exhaust state administrative remedies before bringing a § 1983 action and citing its own cases acknowledging this.[4] The Alaska Supreme Court denied the petition, but withdrew and reissued its opinion in *Beard III*,

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[2] Transcript of Evidentiary Hearing of April 11, 1994 (ruling only), App. 135-137.

[3] Alaska's Civil Rule 52(a) is the same as the Federal Rule, Fed. R. Civ. P. 52(a).

[4] Beard's *Petition for Rehearing* of December 2, 1997, App. 36-42.

adding a statement to its opinion on rehearing that Beard waived this by not briefing it.[5]

REASONS FOR GRANTING THE WRIT

I. THE ALASKA SUPREME COURT'S HOLDING IN *BEARD III* AND *IV*, THAT § 1983 CLAIMS ARE SUBJECT TO DEFENSES OF FAILURE TO EXHAUST STATE ADMINISTRATIVE PROCEDURES, DIRECTLY CONFLICTS WITH U.S. SUPREME COURT PRECEDENT

When Beard stated his argument point I, (n. 1 above) and cited, *inter alia*, *Patsy v. Board of Regents* in his *Beard I* brief for the rule that § 1983 plaintiffs need not exhaust administrative remedies, the point was raised before the Alaska Supreme Court.

When *Beard I* held that Beard was excused from further attempts to exhaust because he had established futility, this issue was *res judicata* by virtue of Alaska's "law of the case" doctrine, which "prohibits the reconsideration of issues which have been adjudicated in a previous appeal in the same case." *Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758, 763 (Alaska 1977).

From the decision in *Beard I* through trial and post-trial motions, the Alaska Superior (trial) Court followed the ruling of the Alaska Supreme Court, that futility of

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[5] *State of Alaska, Caroline Venusti and William McMullen v. Burle S. (sic) Beard*, ___ P.2d ___ (Alaska Supreme Court Op. No. 4996, May 29, 1998) *(Beard IV)*.

exhausting had been established as a holding. Consequently, there was no authority in the trial court to relitigate the issue, nor for Beard to re-raise alternative reasons in support of the *Beard I* decision in his favor. The Alaska Supreme Court's "law of the case" doctrine precluded Beard from re-arguing the Patsy rule until the Court, in *Beard III*, reversed its prior futility holding.

Following remand of *Beard II*, the trial court then ruled in his favor. When Defendants appealed, in order for Beard to again raise the *Patsy* non-exhaustion rule, he would have been raising alternative grounds for why the *Beard II* decision was wrong in ordering the remand hearing. The Court had already passed on that in *Beard I*.

In sum, the Alaska Supreme Court failed to follow *Patsy*, cited for this point in the *Beard I* briefs, when it held, on an alternative ground, that Beard was excused because of futility. While the Court would not have reached the alternative ground of futility had the Court followed *Patsy*, from the *Beard I* decision on, Alaska's "law of the case" doctrine prevented Beard from relitigating that issue until the Court reversed its *Beard I* holding in *Beard III*. *Beard II* did not overrule the *Beard I* holding on this point; it adhered to the holding that the law required either futility to be established or the unexcused failure to exhaust would bar the claims. Either one was the Court's rejection of the *Patsy* rule, as it renders futility irrelevant.

In *Beard III*, Beard was the appellee responding to challenges to the trial court's decision in his favor on the futility issue, which the *Beard II* decision had ordered the trial court and parties to revisit. Defendants'/Appellants'

challenges, in *Beard III*, to the trial court's findings did not address any § 1983 issues.

When *Beard III* reversed the trial court's futility finding and the judgments in Beard's favor, he petitioned for rehearing, pointing out the apparent oversight in the Alaska Supreme Court's not realizing that Beard had cited *Patsy* in his *Beard I* brief, but, irrespective of how it happened, that its holding on this point was directly against controlling federal law. The Court responded with *Beard IV*, faulting Beard for not raising the issue before.

II. ALASKA'S "FAILURE TO BRIEF CONSTITUTES WAIVER" RULE OF PROCEDURE SHOULD NOT BE ALLOWED TO DEFEAT § 1983 CLAIMS WHEN PLAINTIFF/APPELLEE CITED *PATSY V. BD. OF REGENTS* FOR THIS HOLDING IN HIS FIRST BRIEF TO THE STATE SUPREME COURT, AND IT WAS AN ALTERNATIVE GROUND TO AFFIRM SPECIFICALLY BROUGHT TO THE COURT'S ATTENTION IN BEARD'S PETITION FOR REHEARING

In denying Beard's petition for rehearing of *Beard III*, the Alaska Supreme Court incorrectly stated the history[6] of prior proceedings and ruled that Beard's raising the *Patsy* rule in his *Beard I* brief and in his petition for rehearing of *Beard III* were insufficient.[7]

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[6] "History" is the descriptive term here. This case has lasted twice as long as World War II. It was filed in February 1987.

[7] In fact, the Alaska Supreme Court erroneously stated, in denying rehearing, that Beard had not previously raised this

The Court did not address whether established federal law on this point is controlling.

Beard's opening brief in *Beard I* cited *Patsy v. Board of Regents*, 457 U.S. 496, 73 L.Ed.2d 172 (1982), App. 164, for its holding that a 42 U.S.C. § 1983 plaintiff need not exhaust state administrative remedies, under argument point I (Beard's exclusive remedy was not the Collective Bargaining Agreement), quoted in note 1, above.

From *Beard I* through trial and briefing in *Beard II*, Beard and the trial court believed the holding in *Beard I* – that Beard had established futility – was law of the case, as did dissenting Justice Compton. Thereafter, Beard did not raise alternative reasons to support this decision in his favor until the *Beard III* decision came down, reversing its own holding in *Beard I* and reversing the trial court's findings at the evidentiary hearing following *Beard II*. Beard then pointed out the conflict of *Beard III* with *Patsy* and *Felder v. Casey* in his petition for rehearing. App. 36-41.

During *Beard II* and *III*, Beard was the appellee, so he did not select the points on appeal. As appellee, Beard should have benefitted from a rule of procedure found in a long line of Alaska cases holding that the Alaska Supreme Court will affirm on any correct reason appearing from the record, even on grounds not relied on by the trial court. *Beard II*, 796 P.2d at 1349 (another reason with legal basis); *Wood v. Collins*, 812 P.2d 951, 959 (Alaska

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point in *Beard I*. Beard is uncertain whether its holding is rule announced on the actual record, or on the Court's incorrectly perceived record.

1991) (may affirm on different grounds whether or not those grounds appear in record); *Walt v. State*, 751 P.2d 1345, 1348 n. 2 (Alaska 1988) (even if superior court decision incorrect, Supreme Court may affirm on other grounds which, as a matter of law, support result).

The Alaska Supreme Court's opinion in *Beard III* directly conflicts with controlling United States Supreme Court precedent, *Patsy v. Board of Regents*, 457 U.S. 496, 73 L.Ed.2d 172 (1982) (failure to exhaust defense not available for § 1983 claims); and *Felder v. Casey*, 487 U.S. 131, 101 L.Ed.2d 123 (1988) (expanding *Patsy* ruling to § 1983 claims brought in state court).

The Alaska Supreme Court's subtle attempts to avoid binding federal authority by (1) failing to address it when properly brought to the Court's attention, and (2) faulting Beard for following its law of the case doctrine, when he accepted the alternative (futility) ruling in his favor as binding, (3) reversing a jury verdict on an issue never submitted to a jury, then (4) refusing to acknowledge and follow controlling federal precedent when cited again in the briefing prior to *Beard IV*, have resulted in the frustration of a central purpose of § 1983: swift access to the courts for jury trials.

The Alaska Supreme Court has structured its final decision in terms of respect for the exhaustion requirement as a rule which "promotes judicial efficiency by affording an institution an opportunity to correct its own errors, so as to render judicial action unnecessary."[8] However, it was apparent to the Supreme Court, as Justice

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[8] App. 9, *Beard IV*.

Compton's dissent in *Beard II, III* and *IV* stated, that the jury verdicts, which the Alaska Supreme Court affirmed in *Beard II*, plainly show that this institution had no interest whatsoever in correcting its own errors. Nor does the exhaustion requirement, when applied after the fact, promote judicial or any other form of efficiency when the Court rules, after eleven years of litigation, a three-week jury trial and three appeals, that sometime between mid-May 1986 and August, when Beard quit, he should have asked his union, one more time, to grieve the pattern, but this time use the magic words "constructive discharge." *Beard IV, id.*, Compton, J., dissenting.

If the Alaska Supreme Court's final disposition stands, then government officials in Alaska are invited to abuse state power to deprive individuals of fundamental constitutional rights, ignoring binding federal precedent. Other government officials have already cited *Beard IV* to the Alaska Supreme Court as authority for overturning § 1983 verdicts against them. *See opening Brief of City, Cole and Pulice,*[9] App. 168-172, where City of Fairbanks attorneys, in attempting to overturn § 1983 verdicts against them, wrote to the Alaska Supreme Court:

> The grievance procedures formed the "exclusive method of resolving grievances arising under [the CBA], not including unfair labor practices or other disputes covered under PERA" (Exc. 367). Arbitration is favored in Alaska and **exhaustion of administrative remedies must be pursued before court action.**

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[9] Page 4 of the Brief, App. 169, is also included to show jury verdicts were rendered against defendants on 42 U.S.C. § 1983 claims.

State v. Beard, ___ P.2d ___ Op. No. 4996 at 8 (Alaska, May 29, 1998) (*Beard IV*). This policy "promotes judicial efficiency by affording an institution an opportunity to correct its own errors, so as to render judicial action unnecessary." *Id.* At 8-9.

This Court held:

> We consequently hold that the unexcused failure to exhaust that bars Beard's claims against the State also bars his claims against McMullen and Venusti. The well-recognized principles favoring exhaustion apply equally to claims against supervisors who engaged in the tortious conduct that formed the basis for Beard's State IIED and constructive discharge claims. The judgment against Venusti and McMullen must therefore be set aside. [App. 170-171[10]]
>
> (Emphasis added)

No other state court decisions were found which ruled as did Alaska on this issue. Nor did either of the two primary treatises on 42 U.S.C. § 1983 mention any

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[10] From this paragraph alone, one could get the impression that Beard's claims were not § 1983 claims. However, the Alaska court's *Beard I* decision plainly discusses them as such and Beard's *Amended Complaint*, App. 143-148, *Pretrial memorandum*, App. 150-57, pertinent jury instructions, App. 42, and *Special Verdict*, App. 43-45, are included in the Appendix to show Beard's claims were pled, briefed, tried and proven as 42 U.S.C. § 1983 claims.

The handwritten statement from the jury in response to question 7 of the *Special Verdict* appears in italics: "No amount of money could fairly compensate Mr. Beard for loosing (sic) his freedom of speech." App. 45.

cases which went against the *Patsy* holding.[11] Both these treatises were cited to the Alaska Supreme Court for this proposition prior to its decision in *Beard IV*. App. 37-38.

This is not a case where binding federal precedent was not called to the Court's attention, or was called too late or where the law is unsettled. This is a case where the Court refused to follow clearly settled federal law, and where, after the *Beard I* decision finding futility, (1) Beard was prevented by Alaska's "law of the case" rule of procedure from bringing up the issue again, (2) another rule of state procedure was incorrectly applied to fault Beard for not citing *Patsy* often enough when, at worst, he could be faulted only for not repeatedly citing it, and (3) a rule in Beard's favor – that the Court will affirm on any correct ground appearing from the record – was, without explanation, not followed.

The Alaska Supreme Court's decisions in *Beard III* and *IV*, and its failure to follow *Patsy* and *Felder* directly contravene the central purpose behind 42 U.S.C. § 1983, to throw open the courts' doors to civil rights cases, cases of intense magnitude to plaintiffs and also to society as a whole. *See, e.g., Mitchum v. Foster*, 407 U.S. 225, 32 L.Ed.2d 705 (1972).

Where state and local officials fail in their primary duty to stop and remedy constitutional violations, the federal courts will aid the victims. *Swan v. Charlotte-*

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[11] *See* Schwartz & Kirklin, *Section 1983 Litigation, Claims and Defenses*, § 10.3, p. 560 (3d ed. 1997); Nahmod, *Civil Rights and Civil Liberties Litigation, The Law of Section 1983* (3d ed.) § 9.12.

MecKlenberg Bd. Of Ed., 402 U.S. 1, 28 L.Ed.2d 554 (1971); *Milliken v. Bradley*, 433 U.S. 267, 53 L.Ed.2d 745 (1977).

From the defendant state officials, to the Alaska Attorney General, to the Alaska Supreme Court, there was a variety of state authority that could have been brought to bear to remedy these constitutional violations. For some reason unknown to Beard, they have been against him for the most part, while the jury, trial court and dissenting justice have tried to right these wrongs.

Section 1983 is supplementary and independent of state remedies. *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed.2d 492 (1961).

When state courts create state law defenses to § 1983 claims not found in federal law, such holdings directly violate federal law. *Howett v. Rose*, 496 U.S. 356, 110 L.Ed.2d 332, 353 (1990). Federal rights cannot be defeated by the forms of local practice. *Felder v. Casey, supra*, 487 U.S. 131, 138.

The Alaska Supreme Court's decision in *Beard IV*, particularly when read in light of the Court's failure to recognize *Patsy* in *Beard I*, Alaska's "law of the case" doctrine and the failure to follow its otherwise consistent practice of affirming on any correct point of law, even if not relied on by the lower court or raised by the parties, is a serious instance of adding procedural state law barriers to frustrate the aggressive remedial purpose of § 1983 and its settled case law. *Beard IV* is a significant departure from controlling federal precedent which heretofore had settled this area of law in state and federal courts. Alaska is now the only state in the nation, to

counsel's knowledge, allowing failure to exhaust administrative procedures to defeat § 1983 claims.

CONCLUSION

The end result of this litigation is that a harsh rule applied with formalistic reasoning has lead to an unjust result. Those are not the terms of Beard's lawyer, but of the dissenting justice in *Beard III* and *IV*.

For these reasons, Petitioner respectfully requests this Court to grant this petition for certiorari.

THOMAS R. WICKWIRE
Counsel of Record for Petitioner

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, CAROLINE VENUSTI and WILLIAM McMULLEN, Appellants and Cross-Appellees, v. BURLE S. BEARD, Appellee and Cross-Appellant.	Supreme Court Nos. S-6378/6438 Superior Court No. 4FA-87-369 CI OPINION [No. 4996 – May 29, 1998]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge.

Appearances: Randy M. Olsen, Assistant Attorney General, Fairbanks, and Bruce M. Botelho, Attorney General, Juneau, for Appellants and Cross-Appellees. Thomas R. Wickwire, Fairbanks, for Appellee and Cross-Appellant.

Before: Compton, Chief Justice, Rabinowitz, Matthews, and Eastaugh, Justices. [Moore, Justice, not participating.]

EASTAUGH, Justice.
RABINOWITZ, Justice, concurring.
COMPTON, Chief Justice, dissenting.

I. INTRODUCTION

This is the third appeal involving Burle Beard's claims against the State of Alaska and several State employees. *See Beard v. Baum*, 796 P.2d 1344 (Alaska 1990) (*Beard I*); *Cameron v. Beard*, 864 P.2d 538 (Alaska 1993)

(*Beard II*). In *Beard II*, we remanded for an evidentiary hearing to determine whether Beard's failure to exhaust his administrative remedies barred his claims. The superior court excused Beard's failure to exhaust. The State and the individual defendants now appeal this ruling (and others). Beard's consolidated cross-appeal argues that the State's agreement to indemnify the individual defendants violates public policy. Concluding that Beard failed to exhaust his administrative remedies, we reverse.

II. FACTS AND PROCEEDINGS

We have previously detailed the events which culminated in Beard's lawsuit. *See Beard I*, 796 P.2d at 1347-48; *Beard II*, 864 P.2d at 540-44. In *Beard I*, we held, *inter alia*, that the superior court erroneously dismissed Beard's claims against the State defendants for failing to exhaust the remedies available under his collective bargaining agreement (CBA). *Beard I*, 796 P.2d at 1349. We observed:

> [Bruce Senkow, Beard's union representative, stated in an affidavit submitted to the court] that Beard had complained to him that his supervisors were harassing him to make his work environment intolerable. Senkow told Beard that he could not pursue the grievance because the actions Beard complained of fell under management's prerogative under Article 5 of the CBA. Under the CBA grievance procedures, Beard could not pursue his grievance past the initial steps without the cooperation of an APEA [Alaska Public Employees Association] representative.

Id.

On remand, the State defendants moved for summary judgment on the exhaustion issue. They based their motion on Bruce Senkow's February 1991 deposition testimony which allegedly contradicted his earlier affidavit. *Beard II*, 864 P.2d at 543. The superior court denied this motion, and other pending defense summary judgment motions, stating generally that "there are factual issues to be resolved." *Id.* Nonetheless, the court agreed to hear oral argument on the exhaustion issue if Beard prevailed at trial. *Id.*

At trial, the jury returned a $696,571 verdict for Beard. *Beard II*, 864 P.2d at 544. The individual defendants, William McMullen, Caroline Venusti, and Harold Cameron, were each assessed compensatory damages of $1,000 for intentional infliction of emotional distress. *Id.* Another individual defendant, Sharon McLeod, was found not liable for compensatory damages, but was assessed punitive damages of $1,000. *Id.* The jury also awarded Beard punitive damages against McMullen ($70,000), Venusti ($45,000), and Cameron ($45,000). *Id.*

After the jury returned the verdict for Beard, the superior court ruled that our *Beard I* decision had rendered the exhaustion issue res judicata. *Beard II*, 864 P.2d at 544. The superior court entered judgment for Beard.

The defendants appealed. They challenged various superior court rulings, including its decision on exhaustion. *Beard II*, 864 P.2d at 540. We held in *Beard II* that *Beard I* had not conclusively resolved this question, and remanded.

> The superior court erroneously interpreted our decision in *Beard I* as conclusively deciding

> the exhaustion issue. Our decision merely reversed the court's ruling in favor of the State and did not constitute a final determination that Beard was excused from pursuing his remedies under the collective bargaining agreement. Beard never sought summary judgment on this issue and the State never had an opportunity to rebut the evidence presented in Beard's opposition. The doctrine of res judicata does not apply when one party has not had an opportunity to litigate an issue. We therefore remand this issue to the superior court for an evidentiary hearing.

Beard II, 864 P.2d at 545 (citations omitted).

At the remand hearing, Senkow testified that he was very familiar with Beard's grievance history because he had helped Beard process five separate grievances while Beard was employed with DOT. According to Senkow, he had no significant contact with Beard during the summer of 1986, although Beard contacted him in May about a supervisor's request for a sick-leave slip, and at least one of Beard's grievances was pending. Senkow testified that Beard never told him that he was going to quit because his work conditions were intolerable or because his firing was imminent. Senkow also testified that his May 15, 1987, affidavit referred to conversations he had with Beard earlier in the year.

Beard's attorney cross-examined Senkow about his 1991 deposition, where he had testified that he had never considered Beard's work problems to be related or advised Beard to consider a constructive discharge claim. Senkow reiterated his view that Beard's complaints concerning work assignments, sick-leave slips, and "cold-shouldering" were not grievable. He also testified that he

did not see a pattern in the complaints Beard brought to him.

> Q: [by Beard's attorney] Your belief that you can't grieve a year's worth of pattern is consistent with why you didn't grieve the pattern; right?
>
> A: No, that's not correct. That's not consistent. In the context of that deposition and what I was answering at that point, you know – normally when somebody gets disciplined, there's been progressive discipline. That in itself is a pattern. We grieve – we grieve that. So we do grieve a pattern. I mean, we grieve the whole process of progressive discipline. So, I mean, you know, I know we can grieve the whole disciplinary area. That includes investigations and written warnings, suspension, and ultimately termination.
>
> Q: Right. But your statement there that you can't grieve a pattern, you have to grieve an incident. And your testimony we went over. But Mr. Beard wanted to lump these all together and you wanted to keep them all separate.
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> A: I don't know what. . . .
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> Q: Those are all consistent with your affidavit. . . .
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> A: I don't know at what point. . . .
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> Q: . . . that says he told you about those and you didn't think you could grieve them. Right?
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> A: I don't know at what point Beard asked me to grieve a pattern. I don't even know if he did. I don't believe he ever did. I treated those incidents all separately because that's the way they came in. There was no pattern to those.

On re-direct, Senkow stated that Beard was familiar with union procedures and that Beard had appealed Senkow's refusal to grieve a March 1986 warning letter to the grievance committee. He also testified that he was unaware that Beard's problems at work were affecting his health. Finally, Senkow reiterated that he would have filed a constructive discharge grievance if Beard had asked him to do so.

Evie Seymore testified that she had been present during at least two of Beard's meetings with Senkow, at which Senkow had refused to grieve various issues.

> I know in one meeting, he talked about the harassment of having to write down his times at work where he had to keep track of his time by hours and write it down. I know he talked about having to submit a sick leave form where no one else in the office has ever had to submit one. And I know he talked to him about he was not given any real work to do, he was basically given very little work. Burle [Beard] was bored and preferred to be working as opposed to sitting there doing nothing. And Bruce [Senkow] said, well, these were all things that he didn't consider as harassment at all, that they were prerogatives of the management. So he wouldn't do anything about them.
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> . . . .
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> . . . Each time he managed to get Bruce to finally proceed with [a grievance], they were overturned. But he kept trying to tell Bruce, there's a pattern here. This is happening, this is happening, this is happening, this is happening. But Bruce would only deal with one thing at a time and not perceive it as a pattern.

She also testified that Beard had told Senkow that the situation at DOT was causing him a great deal of stress.

During cross-examination by Beard's attorney, Senkow testified that after quitting, Beard asked Senkow to grieve his final evaluation, and nothing else. As Beard requested, Senkow grieved the final evaluation.

At the close of the hearing, the superior court ruled that the union knew or should have known that Beard wanted to grieve his overall work situation at DOT even though Beard did not use the specific term "constructive discharge."

> The Court finds that the union did not in fact present a grievance to take into account [the] overall context of what was occurring. It's sufficiently clear to the Court that in Mr. Beard's contact with the union, it should have been clear to the union what Mr. Beard wanted. And that was basically to stop the harassment and [present] him an acceptable work place.
>
> As even the testimony of Mr. Senkow indicates, he was fighting the individual battles one at a time and doing well and winning the battles. But they lost sight of the fact that the war was not being waged. Mr. Senkow's affidavit, the original affidavit is pretty clear in the sense that we are not going to arbitrate or grieve the overall situation because it's not grievable. His subsequent testimony is in a different light, in a different context. At the time these events were occurring, it's clear that with respect to many of the – it's the overall course of conduct we're dealing with, not a specific event, that there was a factual inconsistency in evaluation. The fact that he was being shunned by the people at

> DOT, the fact that he was being assigned this and that, although not grievable, certainly was part of the overall factual situation that led to his ultimate termination.
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> The Court specifically finds that it should have been sufficiently clear to the union that Mr. Beard wanted to correct his intolerable situation at DOT. They did not proceed to represent him in connection with that.

The court also ruled that even if the union had been willing to assist Beard in filing a grievance on these matters, such efforts would have been futile.

> [E]ven if a grievance had been filed on that based on what had occurred in connection with the factual information that occurred at trial as well as the jury verdict, any grievance concerning his work situation, any grievance concerning his termination would have been entirely futile. Even if he had won the grievance and gone back to work, the situation still would not have been corrected. He might have won the grievance, but he still would not have won the war.

Following post-hearing rulings on other issues, the State, Venusti, and McMullen appealed. Beard cross-appealed.

III. DISCUSSION

A. Exhaustion of Administrative Remedies

We have repeatedly held that employees must first exhaust their contractual or administrative remedies, or show that they are excused from doing so, before they

may pursue direct judicial actions against their employers. *See, e.g., Beard II*, 864 P.2d at 545. *See also Voigt v. Snowden*, 923 P.2d 778, 781-83 (Alaska 1996). This policy "promotes judicial efficiency by affording an institution an opportunity to correct its own errors, so as to render judicial action unnecessary." *Eidelson v. Archer*, 645 P.2d 171, 181 (Alaska 1982). *See also Eufemio v. Kodiak Island Hosp.*, 837 P.2d 95, 99 (Alaska 1992) (doctrine of exhaustion of remedies also encourages the development of a factual record and discourages the "deliberate flouting of its processes"). However, an employee may be excused from exhausting administrative remedies if the administrative process is tainted or biased, *Eidelson*, 645 P.2d at 179-83, or if the employee's union refuses to participate in the grievance process. *Beard I*, 796 P.2d at 1348-49; *Casey v. City of Fairbanks*, 670 P.2d 1133, 1136-37 (Alaska 1983).

The superior court ruled as follows on remand:

> The Court finds, number one, that the union was certainly put on notice and was put on notice of what the intolerable situation of Mr. Beard was with respect to the work. That the union did not grieve that aspect of the situation. And number two, even if there was – he failed to present sufficient information to the union so that they were on notice of what he wanted them to do, it would have been futile to grieve that aspect and it's therefore excused.

On appeal, the State asserts that the superior court's ruling is both factually and legally flawed. First, the State asserts that the evidence presented at the remand hearing does not support the court's finding that the union "knew

or should have known" that Beard felt his working conditions at DOT were intolerable at the time he resigned. Second, the State argues that this court's decision in *Casey* requires, at a minimum, that the employee establish that the union explicitly refused to grieve a complaint before the employee can be excused from pursuing administrative remedies. Finally, the State asserts that the superior court misapplied *Casey* in ruling that futility excused Beard from exhausting his administrative remedies.

1. Standard of review

It is within the superior court's discretion to determine whether a particular employee has exhausted the administrative remedies available. *Eufemio v. Kodiak Island Hosp.*, 837 P.2d 95, 98 (Alaska 1992). This court will reverse a ruling for abuse of discretion only when "left with a definite and firm conviction, after reviewing the whole record, that the trial court erred in its ruling." *Id.* (quoting *Morgan v. State, Dep't of Revenue*, 813 P.2d 295, 297 n.4 (Alaska 1991)).

We will review the superior court's conclusions of law using our independent judgment. *Pedersen-Szafran v. Baily*, 837 P.2d 124, 127 n.1 (Alaska 1992). The superior court's factual findings will only be reversed if "clearly erroneous." *City of Hydaburg v. Hydaburg Co-op. Ass'n*, 858 P.2d 1131, 1135 (Alaska 1993).

2. Refusal to grieve

An employee may be excused from exhausting administrative remedies if the union refuses to process

the employee's grievance. *Casey*, 670 P.2d at 1135. In that case, a former building inspector sued the City of Fairbanks for wrongful discharge. The superior court granted summary judgment to the City, ruling that Casey had failed to exhaust his administrative remedies. *Id.* In reversing this ruling, we observed that Casey could not have pursued his grievance without the assistance of his shop steward or supervisor and that those individuals had refused to help him. *Id.* at 1136-37. Therefore we concluded "as a matter of law that Casey made a good faith effort to pursue his grievance. Any further action that Casey could have taken was excused because it would have been futile." *Id.* at 1137.

A majority of jurisdictions have held that a union's refusal to pursue an employee's grievance will excuse the employee's failure to exhaust where

> the union has sole power under the contract to invoke the higher levels of the grievance procedure *and* if the union has prevented the employee from exhausting his remedies by its wrongful refusal to process the grievance.

Croston v. Burlington N.R. Co., 999 F.2d 381, 386 (9th Cir. 1993) (emphasis in original) (citation omitted); *see also Vaca v. Sipes*, 386 U.S. 171, 185 (1967); *Thompson v. Modernfold Indus.*, 373 N.E.2d 916, 919 (Ind. App. 1978); *Gilstrap v. Mitchell Bros. Truck Lines*, 529 P.2d 370, 374-76 (Or. 1974). Most courts have equated a "wrongful refusal" to process a grievance with a breach of the union's duty of fair representation. *See Thompson*, 373 N.E.2d at 923 (holding that a union breaches its duty of fair representation by conduct which is "arbitrary, discriminatory or in bad faith"); *Gilstrap*, 529 P.2d at 375 (holding that a union has

a duty to protect an employee's rights in good faith and in a nonarbitrary manner).

In this case, the superior court found that based on Beard's contacts with Senkow, the union knew or should have known that Beard wished to grieve his overall work situation and that the union failed to file such a grievance. Like Casey, Beard needed the cooperation of a union representative to process a grievance past the initial steps.[1] Finding that the union failed to grieve, the superior court concluded that Beard was excused from exhausting his administrative remedies. The State asserts that this finding is both clearly erroneous and an improper extension of *Casey*.[2]

Our review of the record leads us to conclude that the superior court erred in determining that Beard is excused from exhausting his remedies. The record suggests that up until mid-May 1986, about three months before he quit, Beard tried to resolve his work conditions through the available grievance procedures. *See Casey*, 670 P.2d at 1136 (holding that employee had made a "good faith" effort to pursue his grievance where the

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[1] Article 10 of the CBA provided for the processing of grievances or "any controversy or dispute arising between . . . an Employee . . . and the Employer." The CBA outlined a five-step process concluding with arbitration. The CBA specified that "GRIEVANCES AT STEP THREE AND BEYOND MUST BE PROCESSED THROUGH APEA BUSINESS REPRESENTATIVES."

[2] The State does not argue that a test other than that announced and applied in *Casey* should apply here or that we should reconsider *Casey*. It is consequently not necessary in this case to reach the issues discussed in the concurring opinion.

individuals required to process his grievance refused to process an employee's complaint). Beard grieved several incidents either on his own or with the union's help in the twelve months before his resignation. At the time he resigned, the union was still processing at least two grievances. The union, through its representative, Senkow, had refused to grieve several of Beard's complaints. Both Senkow's affidavit and his testimony at the hearing indicate that Beard asked Senkow to grieve various aspects of his work environment, but that Senkow told him that such matters were not grievable since these actions might be considered management prerogative.[3] For example, Senkow refused to grieve Beard's complaint about a supervisor who had required Beard to justify his use of sick leave in May 1986. Seymore's testimony also indicates that Senkow refused to grieve two of Beard's complaints, including his complaint that his supervisors forced him to keep detailed time sheets and avoided assigning work to him. Seymore also testified that Senkow refused to see a "pattern" in the conduct of Beard's supervisors.

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[3] Senkow affied:

> Mixed in with my discussions with Mr. Beard were his complaints that one or more of his supervisors were trying to harass him by using work assignments, apportioning the workload and otherwise structuring his work environment so as to make it as uncomfortable as possible. I explained to him that this is not a grievable matter as it is not provable by the correspondence and personnel file documents and is, on its face, one of those areas that is left to management prerogative.

Nonetheless, Beard last asked the union to grieve his work conditions several months before he resigned. (He last sought union assistance concerning work conditions in May 1986, and resigned on August 22, 1986.[4]) Following termination, Beard did not renew any earlier request that the union grieve a pattern and did not ask the union to grieve his resignation as a termination or constructive discharge. His only post-termination grievance request related to the "bad" final evaluation, not work conditions. Senkow testified that he would have filed a constructive discharge grievance had Beard asked him to do so. Because Beard never asked the union to grieve his departure from office, the union was never given a chance to participate in the grievance process with respect to Beard's resignation. *See Casey*, 670 P.2d at 1136-37.

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[4] Beard claimed that his work conditions amounted to supervisor harassment. In *Beard I* we held that evidence of the Union's failure to grieve what Beard claimed was a pattern of harassment excused his failure to grieve his constructive termination claim, requiring that the summary judgment entered for defendants be set aside. 796 P.2d at 1349. In *Beard II* we remanded for determination of whether Beard's failure to grieve was excused. 864 P.2d at 545. We assumed in both opinions that evidence of Union refusal to grieve claims of harassing work conditions was relevant to whether Beard was excused from asking the Union to grieve a claim that those conditions forced him to resign. Only upon remand following *Beard II* was the disputed futility issue tried with full opportunity to offer evidence on whether a pre-resignation refusal to grieve particular complaints of harassing conduct excused Beard from failing to ask the Union after he resigned to file a grievance that would have claimed that harassing conduct forced him to quit.

Where an ongoing pattern of harassment in the workplace culminates in an employee's resignation, the employee must attempt to grieve this involuntary termination even if the union has previously been unresponsive to the employee's complaints of harassment. In other words, the union must be afforded a reasonable opportunity to represent the employee, and the employer must be given an opportunity to remedy any wrongs through non-judicial means. To hold otherwise would undermine this court's strong policy favoring the resolution of labor disputes through administrative procedures.

Given the facts, we hold that the superior court's findings that Beard made a good faith effort to file grievances and that the union did not support him in his effort were clearly erroneous with respect to an incipient constructive discharge claim. We therefore hold that the superior court abused its discretion in ruling that Beard's failure to exhaust his administrative remedies was excused under *Casey*.

3. Futility

The superior court reasoned that even if Beard had exhausted his remedies and filed and won a grievance and gone back to work, the "situation still would not have been corrected. He might have won the grievance, but he would not have won the war."

We cannot conclude that a successful grievance would have provided Beard with a remedy so inadequate as to render futile his pursuit of the grievance procedure. Had Beard successfully grieved a constructive discharge,

he would have been entitled to reinstatement with back pay. Even if we assume that reinstatement would have returned him to the same unsatisfactory environment, recovery of back pay for the period he was off work would nonetheless have given him a substantial remedy and would also have tended to discourage further harassing conduct by supervisors. Continued harassment would presumably have led to further successful grievances, up to and including another successful constructive discharge claim, leaving the State with the prospect of having a vacant position in the interim, or potentially paying both a salary to a replacement employee and back pay to Beard. The record reflects that Beard's collective bargaining agreement contained a five-step grievance process culminating in binding arbitration. Article 10, section 2, paragraph 3 of the CBA states: "The arbitrator shall have the power to return a grievant to employee status with or without restoration of back pay, or mitigate the penalty as equity suggests under the facts." There was no evidence reinstatement with back pay was beyond the authority of the arbitrator. Further, the record reflects that Beard had successfully used the grievance process in the past. Senkow testified that he had processed five grievances for Beard and was successful in each case. The demonstrated success of the grievance process on those occasions refutes any argument that the grievance process was doomed to failure. In the absence of evidence that reinstatement and a monetary remedy were not available administratively, the superior court's conclusion of futility is wrong as a matter of law.

We also note that the superior court's decision makes a fundamental assumption about something that should

not be assumed: that the arbitrator could not have provided an adequate remedy. Article 10, section 1 of the CBA extends the agreement to "any . . . controversy or dispute having occasion to arise between the parties." Article 10, section 7 stipulates that "the arbitrator shall have the authority to rule on arbitrability issues. . . ." In the first instance, it was the arbitrator who had the authority and responsibility to determine the scope of the arbitrator's powers. Beard cannot base his futility argument on the theory the CBA did not allow the remedy he seeks when it was his failure to exhaust which prevented an arbitrator from deciding whether that remedy was administratively available. Because the CBA itself did not prevent the arbitrator from fashioning an adequate remedy, Beard cannot assert futility as an excuse for failing to exhaust his administrative remedies.

4. Claims against McMullen and Venusti

McMullen and Venusti argue that the superior court should have dismissed the claims against them as individual defendants because Beard did not exhaust his administrative remedies. They assert that the conduct Beard complains of was subject to the CBA grievance process. Beard's appellate briefs filed in this appeal and in *Beard I* and *Beard II* did not argue that the intentional infliction of emotional distress (IIED) claims were not subject to the CBA grievance requirements. Nor did Beard's briefs in the three appeals assert that an unexcused failure to exhaust that would bar his claims against

the State would not also bar his IIED and constructive discharge claims against Venusti and McMullen.[5]

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[5] McMullen, Venusti, and the State moved to dismiss Beard's IIED and constructive discharge claims for failure to exhaust administrative remedies. Beard opposed on the ground his failure was excused by the Union's refusal to represent him. He did not argue in the superior court that even if the CBA grievance procedure and authority of the arbitrator covered his State claims, they did not encompass his claims against his supervisors. The superior court dismissed his claims on failure-to-exhaust grounds. We reversed in *Beard I* because it appeared there was a genuine fact dispute about whether the Union had refused to represent Beard on a claim that there was a pattern of harassment leading to constructive discharge. Beard argued in the *Beard I* appeal that none of his claims was arbitrable, but did not argue that even if his claims against the State were arbitrable, his claims against Venusti and McMullen were not. He did not argue in that appeal that even if summary judgment for the State were affirmed, it should be reversed as to the supervisors.

Nor did Beard argue the issue in *Beard II*. Neither previous appeal raised a question whether a failure to exhaust might bar Beard's claims against the State but not his claims against individual supervisors. Both prior opinions tacitly assumed that the exhaustion issue applied equally to the IIED and constructive discharge claims against all defendants. The only dispute about the effect of the CBA was whether the arbitrator could fashion an adequate remedy, not whether the CBA was inapplicable to particular claims against the individual defendants even if it applied to claims against the State.

Beard argues in the present appeal that futility was proven because Senkow refused to grieve the supervisors' acts. He thus implicitly argues that the CBA grievance procedures encompassed the supervisors' wrongful acts.

Beard's petition for rehearing, filed after we issued our original opinion in *Beard III*, raises an argument he did not previously raise in *Beard I*, *Beard II*, or *Beard III*: that his claims against Venusti and McMullen are based at least in part on 42 U.S.C. § 1983, and to that extent are not subject to the exhaustion doctrine. He claims that his IIED claims were based on § 1983. In support, Beard cites *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and *Diedrich v. City of Ketchikan*, 805 P.2d 362 (Alaska 1991).

Beard failed to assert a timely argument distinguishing between § 1983 claims and non-§ 1983 claims in opposing Venusti's and McMullen's fundamental defense, failure to exhaust, which has been the subject of three appeals and three appellate opinions. He also failed to raise a timely distinction between claims against the State and claims against Venusti and McMullen. Beard has consequently waived the argument that the exhaustion doctrine cannot bar his claims against Venusti and McMullen.

Although the dissent, in resolving the exhaustion issue, would distinguish between Beard's IIED claims against Venusti and McMullen and his constructive discharge claims, Dissent at 31-32, Beard does not ask us to draw that distinction.

The dissent also suggests that the union's refusal to grieve a pattern of harassment excuses Beard's failure to

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As noted in the text, Beard argues for the first time in his petition for rehearing filed after we issued our original opinion in *Beard III* that the exhaustion doctrine cannot bar his claims against Venusti and McMullen asserted under 42 U.S.C. § 1983.

exhaust his remedies with respect to the IIED claims. Dissent at 32. Several circumstances convince us otherwise. The union did agree to represent Beard on some grievances, and two grievances were still being processed when Beard resigned in August. After he resigned, the union complied with Beard's request to grieve the final evaluation issue. Nonetheless, after mid-May 1986 Beard never asked the union to grieve his work conditions, including the resignation itself or the post-May conduct that allegedly precipitated his resignation. Because he did not timely ask the union to pursue the work conditions that were central to his IIED claims, he is not excused from failing to exhaust his remedies.

We consequently hold that the unexcused failure to exhaust that bars Beard's claims against the State also bars his claims against McMullen and Venusti. The well-recognized principles favoring exhaustion apply equally to claims against supervisors who engaged in the tortious conduct that formed the basis for Beard's State IIED and constructive discharge claims. The judgment against Venusti and McMullen must therefore be set aside.[6]

B. Other Issues

Our resolution of the exhaustion question moots the remaining issues raised in the appeal and Beard's cross-

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[6] Because we conclude that the claims resulting in compensatory damages awards against McMullen and Venusti were barred by the exhaustion doctrine, the compensatory damages awards against those defendants must be vacated. It follows that the substantial punitive damages awards against those defendants must also be set aside.

appeal. Thus, vacating the judgment against the State, Venusti, and McMullen moots any dispute about when prejudgment interest began to accrue and whether an enhanced rate applied. It also moots the Civil Rule 60(b)(6) relief issue raised by McMullen and Venusti, and Beard's argument that the State's agreement to indemnify Venusti and McMullen is invalid because it violates public policy.

IV. CONCLUSION

We conclude that the superior court abused its discretion in finding that Beard's failure to exhaust his administrative remedies was excused. We therefore REVERSE the judgment and REMAND with instructions to enter judgment for the State, Venusti and McMullen.

RABINOWITZ, Justice, concurring.

Although I agree that the superior court's judgment should be reversed and judgment entered for appellants and cross-appellees, I disagree with the court's reliance on *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983), in Section III.A.2 of the court's opinion. My reasons are as follows.

The court explains in Section III.A.2 that an employee's failure to exhaust administrative remedies is excused by the union's refusal to pursue a complaint when

> the union has sole power under the contract to invoke the higher levels of the grievance procedure *and* if the union has prevented the employee from exhausting his remedies by its wrongful refusal to process the grievance.

Op. at 11 (quoting *Croston v. Burlington N.R. Co.*, 999 F.2d 381, 386 (9th Cir. 1993)). The court further explains that "[m]ost courts have equated a 'wrongful refusal' to process a grievance with a breach of the union's duty of fair representation." Op. at 11.

In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court of the United States reviewed a court's determination that an employee's failure to exhaust his arbitration remedies was excused. The Missouri Supreme Court relied on the fact that the jury found the employee's claim meritorious and thus held that the union must have breached its duty of fair representation by not grieving the claim. *Id.* at 192-93. The federal high court reversed.

Vaca begins by emphasizing the employer's interest in having employees adhere to agreed-upon grievance procedures; arbitration saves the employer the expense of litigation. *Id.* at 191-92. The Supreme Court also noted the contradiction in allowing a union's breach of duty to excuse an employee's failure to exhaust, since the employer "may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement." *Id.* at 185. *Vaca* nevertheless concludes that to leave the employee remediless whenever the union fails to grieve would lead to "great injustice." *Id.* at 185-86.

The Supreme Court therefore settled on a standard that allows the employee to institute judicial proceedings only when the union's refusal to pursue his claim is wrongful. *Id.* at 185. In other words, the refusal must amount to a breach of the union's duty of fair representation. *Id.* at 190. The Court emphasized that it did "not

agree that the individual employee has an absolute right to have his grievance taken to arbitration. . . . " *Id.* at 191.

By insisting on this elevated standard, the Supreme Court sought not only to protect the employer's rights under the agreement, but also to preserve the union's discretion in deciding which complaints will be pursued. "[F]rivolous grievances" are weeded out early when "the union [has] discretion to supervise the grievance machinery and to invoke arbitration. . . . " *Id.* In other words, the union acts as a gatekeeper. It must, "in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances." *Id.* at 194. In detailing the policies underlying preservation of union discretion, *Vaca* states:

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures . . . if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration.

Id. at 191-92 (footnote and citations omitted).

The Supreme Court went on to conclude that the plaintiff employee in that case could not establish a breach of the union's duty of fair representation "merely by proof that the underlying grievance was meritorious"; the employee "must also have proved arbitrary or bad-faith conduct on the part of the Union in processing his grievance." *Id.* at 195, 193.

Vaca's emphasis on the union as gatekeeper, with discretion to determine which complaints will go forward, is consistent with decisions both before and since. The Supreme Court had previously established that "individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and union. . . . [T]here can be no doubt that the employee must afford the union the opportunity to act on his behalf." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965). It had also made clear that the union does not breach its duty of fair representation so long as it acts "honestly, in good faith and without hostility or arbitrary discrimination." *Humphrey v. Moore*, 375 U.S. 335, 350 (1964); *see also Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (emphasizing "hostile discrimination" based on "irrelevant and individious" considerations; no exception if union exercised good faith within "wide range of reasonableness").

In subsequent decisions, the Supreme Court has reiterated that exceptions to mandatory arbitration require "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. . . . " *Amalgamated Ass'n of St., Elec., Ry. and Motor*

Coach Employees v. Lockridge, 403 U.S. 274, 301 (1971). The Court hinted that a showing of negligence would not be sufficient. "[T]he burden of demonstrating breach of duty by the Union . . . involves more than demonstrating mere errors in judgment. . . . The grievance processes cannot be expected to be error-free." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976). At the core of these cases lies the principle that unions must be allowed to make independent determinations as to the merits of individual claims. "[U]nion discretion is essential to the proper functioning of the collective-bargaining system." *International Bhd. Elec. Workers v. Foust*, 442 U.S. 42, 51 (1979).

In *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990), the Supreme Court announced that while the duty of fair representation is of major importance,

> a breach occurs "only when a union's conduct toward a member . . . is arbitrary, discriminatory, or in bad faith." The courts have in general assumed that mere negligence . . . would not state a claim for breach of the duty of fair representation, *and we endorse that view today.*

Id. at 372-73 (emphasis added) (citation omitted) (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)).

Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65 (1991), affirms and elaborates:

> We hold that the rule announced in *Vaca v. Sipes* – that a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith" – applies to all union activity. . . . We further hold that union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's

> actions, the union's behavior is so far outside a "wide range of reasonableness" as to be irrational.

Id. at 67 (citations omitted) (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). *O'Neill* went on to direct courts not to substitute their own judgment for that of the unions. "Any substantive examination of a union's performance . . . must be highly deferential. . . . " *Id.* at 78.

The standard which emerges from this fairly consistent line of cases is that a union's decision not to pursue an employee grievance is reviewed only for an abuse of discretion. A union's refusal to grieve constitutes a breach of duty only when it stems from an improper motive or lacks a rational basis. As the gatekeeper to arbitration, the union must be allowed to independently decide which claims are meritorious and should go forward. Judicial review is deferential.

Burle Beard cannot meet this standard. There is no evidence that union representative Senkow's decision not to grieve Beard's claims as a pattern was the product of an improper motive. Nor can Beard show the decision was irrational. At the exhaustion hearing, Senkow himself testified that he had not discerned a pattern in the complaints Beard had brought to him.

Senkow also refused to grieve several of Beard's individual claims. Among these were complaints that a supervisor had asked Beard to justify his use of sick leave in May 1986, that he was forced to keep detailed time sheets, and that the supervisors avoided assigning work

to Beard. The union's several refusals neither individually nor in combination constitute an abuse of discretion. The record contains absolutely no evidence that Senkow's decisions were the result of an improper motive, nor does Beard so allege. The only possible basis for finding that the union acted wrongfully is that the decisions were irrational.

Senkow's decisions had a rational basis. Senkow affied that he did not pursue the several individual claims because he felt they were "not provable" and the actions fell within "management prerogative." And both Senkow and Beard's witness testified that Senkow did not pursue the pattern complaint because he did not perceive a pattern of harassment against Beard.

As to the individual claims, Senkow's explanation for his refusal is in and of itself rational. The actions which Beard complained of – requiring detailed time sheets, justifying sick leave, and apportioning work load – are all decisions which management is generally entitled to make. Senkow could have rationally concluded that Beard's complaints would not have supported a successful grievance and should not be pursued. His determination that these actions were not provable as harassment because they fell within management discretion, while not necessarily correct, is not irrational. Furthermore, as discussed below, Senkow had reason to doubt Beard's interpretation of events.

As to Beard's pattern complaint, both parties' evidence indicates that Senkow simply did not perceive a

pattern of harassment where Beard did. Senkow's skepticism of Beard's charge of a unified management conspiracy had a rational basis. Senkow's interactions with Beard and the events leading up to Beard's resignation could have led Senkow to conclude that Beard was unduly sensitive and there was no "pattern" against him. None of the evidence available to Senkow conclusively established the existence of an organized campaign.

The evidence which was available to Senkow could either have led him to conclude that Beard was the victim of management orchestrations or that he was a troublemaker. In support of the latter, Beard had charged that Milt Lentz, the Director of the Department of Transportation, had lied about a conversation with Beard during a visit to the office in May 1986. *Cameron v. Beard*, 864 P.2d 538, 543 n.4 (Alaska 1993) (*Beard II*). However, it is entirely understandable that Senkow could decline to believe that the alleged conspiracy against Beard went to the highest levels of the Department of Transportation. Furthermore, the implausibility of the charge could also have led Senkow to discount Beard's other allegations, and to conclude that Beard was overly suspicious of his superiors. Senkow's decisions were not "wrongful." Beard cannot demonstrate that "in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *O'Neill*, 499 U.S. at 67 (citation omitted) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). Nor does the fact that a jury ultimately found Beard's claims meritorious justify his failure to exhaust. This is precisely the argument that was rejected by the Supreme Court in *Vaca*.

In my view, *Vaca* articulates a reasonable standard for determining when an employee's failure to exhaust administrative remedies is excused. The *Vaca* test essentially determines when the employer will be denied the protections of mandatory arbitration because of something the union did. It is reasonable to accord the union discretion over which complaints should be pursued. As a gatekeeper, the union preserves the integrity of the arbitration process by screening out frivolous complaints. If courts did not defer to union decisions, and a union refusal always allowed the grievant to go to court, employers would have little incentive to enter into arbitration agreements in the first place. In this regard, I find the Supreme Court's reasoning compelling. *See Vaca*, 386 U.S. at 191-92.

Furthermore, the standard for exceptions to exhaustion articulated in *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983), is arguably incorrect. Despite this court's acknowledgment of federal preemption, Casey adopted the test articulated in *Eidelson v. Archer*, 645 P.2d 171 (1982), which asks only whether the employee made a good faith effort to seek arbitration. *Casey*, 670 P.2d at 1136. *Eidelson* is inapposite. That case did not involve a collective bargaining agreement and the plaintiff was not dependent on a union for access to administrative remedies. In fact, the plaintiff there was not even a member of a labor union. *Eidelson* involved a doctor's challenge to a private hospital's termination of his staff privileges. *See Eidelson*, 645 P.2d at 172-75. This situation is entirely outside the scope of the Labor Management Relations Act. *Eidelson* is simply an application of the general rule that "an aggrieved member of a private

association must exhaust the remedies provided by the organization before seeking judicial action against the association." *Id.* at 179. The policy driving the decision was that internal remedies allow an organization to apply its expertise and correct its own errors. *Id.* at 176. The *Eidelson* standard has nothing to do with *Vaca*: no labor union was involved, the doctor had direct access to administrative remedies, and it was unnecessary to determine if a union's refusal to grieve was wrongful. *Casey*'s reliance on that case is misplaced. Since I am of the view that *Casey* is in conflict with binding federal law, I would disapprove it.[1]

COMPTON, Chief Justice, dissenting.

I. IIED

I accept, *arguendo*, the court's characterization of *Beard I* and I assume as well that the court is correct in requiring Beard to exhaust his contractual remedies as to individual defendants. The court nevertheless errs, as a matter of fact, in holding that Beard should not be excused from exhausting his contractual remedies as to his claim for IIED. It may be arguable that Beard failed to exhaust his contractual remedies as to the constructive

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[1] This court has held that the federal common law of collective bargaining, including the rules for exceptions to mandatory arbitration, are binding in state cases. *See International Bhd. of Teamsters, Local 959 v. King*, 572 P.2d 1168, 1172 (Alaska 1977) ("Even though this case is in state court, the law to be applied to this issue is federal labor-management common law.").

discharge claim.[1] Beard's resignation was the last essential element of that claim. Beard did not specifically request that Senkow grieve a claim "for constructive discharge" after Beard resigned – after the cause of action arose.

However, Beard's resignation was not an essential element of his claim for IIED. A claim for IIED requires only "(1) that the defendant's conduct was extreme and outrageous, (2) that the conduct was intentional or reckless, (3) that this conduct caused the plaintiff emotional distress, and (4) that the distress was severe." *Cameron v. Beard*, 864 P.2d 538, 548 (Alaska 1993).

Beard did request that Senkow grieve the "pattern of harassment" against him. It is this pattern of harassment which supports both the IIED claim and the constructive discharge claim. Although it is arguable that the constructive discharge claim did not arise until after Beard resigned, no such argument can be made as to the IIED claim. Senkow explicitly refused to recognize the pattern of harassment alleged by Beard, which supports his claim for IIED. Under even the court's stringent interpretation of *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983), Beard has complied with the requirements for excusing his failure to exhaust his contractual remedies as to his IIED claim.[2]

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[1] *But see, infra*, Parts II and III.

[2] "*Casey* requires, at a minimum, that the employee establish that the union explicitly refused to grieve a complaint before the employee is excused from pursuing administrative remedies." Op. at 9.

The court fails to adequately explain why it requires Beard to have asked the union to grieve conduct that occurred "after mid-May 1986." Op. at 18. The pattern of harassment alleged by Beard *prior* to that time is sufficient to support his claim for IIED. Senkow's explicit refusal to grieve this pattern of harassment is sufficient to satisfy the court's interpretation of *Casey*. The court's assertion that Beard "did not timely ask the union to pursue the work conditions that were central to his IIED claims," Op. at 18-19, is inaccurate. The judgments against McMullen and Venusti should be affirmed.

II. Constructive Discharge

The rule laid down by the court is a harsh one:

> Where an ongoing pattern of harassment in the workplace culminates in an employee's resignation, the employee must attempt to grieve this involuntary termination *even if the union has previously been unresponsive to the employee's complaints of harassment.*

Op. at 14 (emphasis added). In the instant case, we have an employee who consistently requested that his union representative aid him in grieving a pattern of harassment. His union representative consistently denied that such a pattern existed or was grievable. Nonetheless, this court requires Beard to know that such a pattern becomes grievable when he is actually forced to resign. Had Beard but known to invoke the magic words "constructive discharge" following his resignation, he would not be faced with this appeal.

This formalistic reasoning leads to an unjust result. It requires employees to possess both specific legal knowledge and unreasonable tenacity. Beard made a good faith effort to resolve his overall working conditions through the available grievance procedures. His union failed to come to his aid. We should require no more than this before permitting employees to turn to the courts for the assistance that their unions refuse to provide.

III. Law of the Case

That said, I adhere to the view I expressed in *Cameron v. Beard*, 864 P.2d 538 (Alaska 1993) (*Beard II*). In *Beard II* I dissented from the court's decision to remand for an evidentiary hearing on the issue of whether Beard was excused from exhausting his contractual remedies. *Id.* at 551-53 (Compton, J., dissenting). My position was that this issue was raised and resolved in *Beard I*. *Id.* at 551. I remain convinced that in *Beard I* this court "unqualifiedly and unconditionally held that Beard was excused from exhausting his contractual remedies." *Id.* at 552. *See Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758, 763 (Alaska 1977) ("The doctrine of the law of the case prohibits the reconsideration of issues which have been adjudicated in a previous appeal in the same case.").

I dissent.

In the Supreme Court of the State of Alaska

State of Alaska, et al. Petitioner, v **Burle B. Beard,** Respondent.	Supreme Court No. S-06378 **Order** Petition for Rehearing Date of Order: 5/29/98

Trial Court Case # **4FA-87-00369CI**

Before: Matthews, Chief Justice, Compton, Eastaugh, Justices, and Rabinowitz, Senior Justice.* [Fabe and Bryner, Justices, not participating.]

On consideration of the Petition for Rehearing filed on **December 2, 1997,** and the response filed on **January 29, 1998.**

IT IS ORDERED

1. The Petition for Rehearing is DENIED because Beard is deemed to have waived the argument, raised for the first time in his petition, that the exhaustion doctrine cannot bar a claim under 42 U.S.C. § 1983.

2. Opinion No. 4913, issued on November 28, 1997, is **WITHDRAWN** and Opinion No. 4996 is issued in its place on today. Part III.A. 4 contains changes. The opinion is otherwise unchanged.

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* Sitting by assignment under article IV, section 11, of the Alaska Constitution and Alaska Administrative Rule 23(a).

Entered by the direction of the court.

Clerk of the Appellate Courts

/s/ Cheryl Jones
Cherly Jones, Deputy Clerk

COMPTON, Justice, dissents. He would grant the petition.

IN THE SUPREME COURT FOR
THE STATE OF ALASKA

STATE OF ALASKA, CAROLINE VENUSTI and WILLIAM McMULLEN,	)	(Filed Dec. 02, 1997)
Appellants and Cross-Appellees,	)	
v.	)	Superior Court No. 4FA-87-369 CI
BURLE B. BEARD,	)	Supreme Court Case Nos.
Appellee and Cross-Appellant.	)	S-6378/6438

PETITION FOR REHEARING

Appellee Beard petitions for rehearing on the ground that the Court has overlooked a directly controlling decision, *Patsy v. Board of Regents*, 457 U.S. 496, 73 L.Ed.2d 172 (1982), Appellate Rule 506(a)(1), or overlooked a material proposition of law, Appellate Rule 506(a)(2): federal law governs and limits the state defenses to 42 U.S.C. § 1983 claims.

I. The 42 U.S.C. § 1983 claims were not subject to state exhaustion requirements.

Section 1983 plaintiffs are not required to exhaust administrative remedies. *Patsy v. Board of Regents*, 457 U.S. 496, 73 L.Ed.2d 172 (1982), followed in Alaska in *State, Dept. of Health & Soc. Services v. ASHNHA*, 856 P.2d 755, 758 (Alaska 1993), and *Diedrich v. City of Ketchikan*, 805 P.2d 362 (Alaska 1991). In *Diedrich*, this Court quoted

from *Felder v. Casey*, 487 U.S. 131, 101 L.Ed.2d 123 (1988), that states are not permitted to place conditions on the vindication of a federal right, 805 P.2d at 368. This Court also stated, *id.* at 369, note 13, "Felder appears to have settled this issue conclusively."[1]

In their treatise, Schwartz and Kirklin collect the reasons why Congress never intended for § 1983 actions to be subject to state administrative exhaustion requirements. One reason was Congress' mistrust for the fact finding processes of state institutions and its belief that the federal courts would be less susceptible to local prejudice and to the existing defects in the fact finding processes of the state courts.[2] Beard's claims, having been proven to a jury, are better examples of this than most cases cited for this, which involve yet to be proven claims.

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[1] Beard cited *Patsy* in his opening brief, p. 31, in *Beard I* for this point. The Court ruled in favor of Beard on the alternative futility issue and adhered to that holding until its decision of *Beard II*. Beard did not cite *Patsy* in his *Beard II* brief because there he took the position that *Beard I* had resolved the exhaustion issue in his favor. From the *Beard II* decision to the end of the remand proceedings in Superior Court, Beard and the Superior Court followed the remand instructions, held the evidentiary hearing and got a decision that Beard prevailed on the facts at issue.

When Defendants appealed that decision, Beard did not cite *Patsy* again, as an alternative ground for affirming. In hindsight, that oversight is quite apparent. Counsel apologizes for his part in causing the Court to miss this proposition.

[2] Schwartz & Kirklin, *Section 1983 Litigation, Claims and Defenses*, § 10.3, p. 560 (3d ed.)

The rule that § 1983 claimants are not subject to state exhaustion requirements is long standing, consistently applied and subject only to well settled exceptions.

The other recognized treatise on § 1983, Nahmod,[3] states that the Supreme Court has consistently followed the no-exhaustion of state administrative remedies rule since 1974,[4] before pronouncing the rule in unequivocal terms in *Patsy* (1982).

Counsel has not found a case directly on point, but it appears the point is clearly established and has supremacy so as to be p [sic], particularly if a state court applied state administrative exhaustion requirements to vacate a § 1983 judgment that had been reviewed on appeal and found otherwise error free. *Brown v. Western Railway*, 338 U.S. 294 (1949), and *Felder v. Casey, id.*, appears to indicate that state pleading rules cannot be applied to preclude a § 1983 claim if the claim would not be subject to such a rule in federal court.[5]

Note 6 of the majority opinion in this case, Slip Opinion at 18, distinguishes claims against the State from claims against individual defendants for the purpose of deciding whether all were covered by the grievance procedure. However, the opinion does not address which claims are § 1983 claims and which are state law only claims. This distinction becomes important only with the new decision because, during the time that futility was

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[3] Nahmod, *Civil Rights and Civil Liberties Litigation*, The Law of Section 1983 (3d ed.) § 9.12.

[4] *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974).

[5] 1 Nahmod, § 1.14, p. 53-54.

established, failure to exhaust was not a bar to either state law or § 1983 claims. The briefs in *Beard III* did not separate the § 1983 claims from the state law claims.[6]

Defendants may fault Beard's counsel for failing to raise this point below. But, Beard prevailed below on the futility issue, so did not challenge it on other grounds or argue with the Superior Court on whether it should consider it at all. Beard would have been stretching the limits of advocacy to urge the Superior Court to disobey the remand instructions and not conduct the review hearing because of *Patsy* or any other authorities. Beard had a duty to follow the remand instructions.[7]

II. The IIED claims are § 1983 claims

Prior to trial, the parties disputed whether Beard must prove that the employer's motive for creating the constructive discharge environment was to deny Beard

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[6] Beard's attorney fee motion memorandum was reviewed for this point. The distinction was not important there because the attorney fees under 42 U.S.C. § 1988 or Civil Rule 82 were nearly identical in amount.

[7] Defendants, if aware of these cases, had a duty to bring *Patsy* or *Felder v. Casey*, or either of the Alaska cases which cited them, to the Court's attention. Rules of Professional Conduct 3.3 provides:

> **Candor Toward the Tribunal**
> (a) A lawyer shall not knowingly:
>
> . . . .
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

his Free Speech rights. Beard contended proof of motive was not part of his burden, even though all the evidence pointed toward intent to retaliate for his Free Speech. Proving this intent was unimportant because individuals and municipalities, but not states, can be liable for § 1983 claims.

This Court agreed that Beard has no such burden to prove the employer's specific intent. *Beard II*, 864 P.2d at 547. The jury was not asked to decide whether any of Beard's proven claims were motivated by something other than retaliation for speaking out on protected Free Speech issues, which they found. Also, it is apparent from this Court's review of the facts in *Beard II*, 864 P.2d at 548, that there was no evidence of any other motive for either the constructive termination acts or the IIED acts. Defendants merely contended they did not do it.

After finding constructive termination, the jury found the defendants liable for emotional distress (Verdict, Q. 5), then found that they harmed Beard by use of state power for his speaking out on possible wrongdoing by co-workers or supervisors (Verdict, Q. 6) and that four of the five individual defendants' wrongdoing was sufficiently egregious to warrant punitive damages. These answers show the jury found that the IIED acts were done as retaliation for Beard's Free Speech complaints. The Defendants contended that the defendants did not do the tortious acts, not that there was a non-§ 1983 motive for them, so once proven, they establish § 1983 claims.

Beard requests the Court to grant rehearing and modify its decision to follow *Patsy, Felder* and *Diedrich*

and hold that Beard was not required to exhaust administrative remedies for his IIED claims because they were 42 U.S.C. § 1983 claims, as they were motivated by Defendants' retaliation for Beard's Free Speech whistleblowing. They were pleaded as such, instructed to and found by the jury as such. Beard asks the Court to consider whether its failure to address the *Patsy* and *Felder* rules was plain error and to correct it.

DATED: 2 December 1997

/s/ Thomas R. Wickwire
Thomas R. Wickwire
Attorney for
Burle B. Beard
ABA #7111049

Mr. Beard's claims against the defendants is made under Federal Statute, 42 U.S.C. Section 1983. Section 1983 provides that any person of this federal district may seek redress in this Court, by way of damages, against any person who, under color of any law, statute or ordinance, regulation or custom, knowingly subjects such person to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States.

Section 1983 speaks of actions taken under color of state law. In order for unlawful acts of an official to be done "under color of . . . law," the unlawful acts must be done while the official is purporting or pretending to act in the performance of his official duties; that is to say, the unlawful acts must consist of an abuse or misuses of power which is possessed by the official only because he is an official; and the unlawful acts must be of such a nature, and be committed under such circumstances, that they would not have occurred but for the fact that the person committing them was an official, purporting to exercise his official powers. If you find that one or more of the individual defendants committed actions during his or her employment, those actions were taken under color of law for purposes of Section 1983.

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,)
Plaintiff(s),)
v.)
DAN BAUM, et al.,)
Defendant(s).)

No. 4FA-87-369 Civil

SPECIAL VERDICT

We the Jury in the above-entitled case find by agreement of ten (10) or more of our members, the following on questions submitted to us.

Q. 1. Did Mr. Beard's supervisors and other Department of Transportation employees acting together or separately make Mr. Beard's job intolerable?

Yes (answer yes or no)

Q. 2. Did Mr. Beard resign because his job had become intolerable by reason of the acts of his supervisors and other employees?

Yes (answer yes or no)

If your answer is "yes" to both question 1 and 2, answer question 3. If your answer is "no" to either question 1 or 2, skip question 3 and go to question 4.

Q. 3. After subtracting any sums which should be deducted according to the instructions I gave you, what is the total amount of earnings and benefits lost by Mr. Beard as a result of the breach of his contract?

$696,571.00

Q. 4. Did any of the individual defendant [sic] intentionally inflict emotional distress on Mr. Beard?

Yes (answer yes or no)

If your answer to question 4 is yes, answer question 5. If your answer to question 4 is "no" skip question 5 and go to question 6.

Q. 5. What amount of money will fairly compensate Mr. Beard for intentional infliction of emotional harm by each of the following defendants. (It need not, but may, be all of them.)

William McMullen	$1000.00
Harold Cameron	$1000.00
Sharon McLeod	$ 0
Daniel Baum	$ 0
Caroline Venusti	$1000.00

Q. 6. Did any of the individual defendants, while exercising the power or authority of their office, retaliate against Mr. Beard by causing harm to him for reporting or speaking out on possible wrongdoing by his

co-workers or supervisors as set forth in Instructions 24, 25?

Yes (answer yes or no)

If your answer to question 6 is "yes" answer question 7. If your answer to question 6 is "no" skip question 7 and go to question 8.

Q. 7. What amount of money will fairly compensate Mr. Beard, for retaliation against him for speaking out on free speech issues, by the following individual defendants? (It need not, but may be all of them.)

William McMullen	$ 0
Harold Cameron	$ 0
Sharon McLeod	$ 0
Daniel Baum	$ 0
Caroline Venusti	$ 0

(No amount of money could fairly compensate Mr. Beard for loosing his freedom of speech.)

Q. 8. Do you find that either one or more of the individual defendants' actions was the type of wrongdoing as to warrant an award of money damages solely to punish them?

Yes (answer yes or no)

If so, what amounts for each individual defendant?

William McMullen	*$70,000.00*
Harold Cameron	*$45,000.00*
Sharon McLeod	*$ 1,000.00*

Daniel Baum $ 0

Caroline Venusti $45,000.00

DATED at Fairbanks, Alaska this 29th day of July, 1991.

/s/ Reneé Moore
FOREPERSON

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, CAROLINE VENUSTI and WILLIAM McMULLEN, Appellants and Cross-Appellees, v. BURLE S. BEARD, Appellee and Cross-Appellant.	Supreme Court Nos. S-6378/6438 Superior Court No. 4FA-87-369 CI OPINION [No. 4913 – November 28, 1997]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge.

Appearances: Randy M. Olsen, Assistant Attorney General, Fairbanks, and Bruce M. Botelho, Attorney General, Juneau, for Appellants and Cross-Appellees. Thomas R. Wickwire, Fairbanks, for Appellee and Cross-Appellant.

Before: Compton, Chief Justice, Rabinowitz, Matthews, and Eastaugh, Justices. [Moore, Justice, not participating.]

EASTAUGH, Justice.
RABINOWITZ, Justice, concurring.
COMPTON, Chief Justice, dissenting.

I. INTRODUCTION

This is the third appeal involving Burle Beard's claims against the State of Alaska and several State employees. *See Beard v. Baum*, 796 P.2d 1344 (Alaska 1990) (*Beard I*); *Cameron v. Beard*, 864 P.2d 538 (Alaska 1993)

(*Beard II*). In *Beard II*, we remanded for an evidentiary hearing to determine whether Beard's failure to exhaust his administrative remedies barred his claims. The superior court excused Beard's failure to exhaust. The State and the individual defendants now appeal this ruling (and others). Beard's consolidated cross-appeal argues that the State's agreement to indemnify the individual defendants violates public policy. Concluding that Beard failed to exhaust his administrative remedies, we reverse.

II. FACTS AND PROCEEDINGS

We have previously detailed the events which culminated in Beard's lawsuit. *See Beard I*, 796 P.2d at 1347-48; *Beard II*, 864 P.2d at 540-44. In *Beard I*, we held, *inter alia*, that the superior court erroneously dismissed Beard's claims against the State defendants for failing to exhaust the remedies available under his collective bargaining agreement (CBA). *Beard I*, 796 P.2d at 1349. We observed:

> [Bruce Senkow, Beard's union representative, stated in an affidavit submitted to the court] that Beard had complained to him that his supervisors were harassing him to make his work environment intolerable. Senkow told Beard that he could not pursue the grievance because the actions Beard complained of fell under management's prerogative under Article 5 of the CBA. Under the CBA grievance procedures, Beard could not pursue his grievance past the initial steps without the cooperation of an APEA [Alaska Public Employees Association] representative.

Id.

On remand, the State defendants moved for summary judgment on the exhaustion issue. They based their motion on Bruce Senkow's February 1991 deposition testimony which allegedly contradicted his earlier affidavit. *Beard II*, 864 P.2d at 543. The superior court denied this motion, and other pending defense summary judgment motions, stating generally that "there are factual issues to be resolved." *Id.* Nonetheless, the court agreed to hear oral argument on the exhaustion issue if Beard prevailed at trial. *Id.*

At trial, the jury returned a $696,571 verdict for Beard. *Beard II*, 864 P.2d at 544. The individual defendants, William McMullen, Caroline Venusti, and Harold Cameron, were each assessed compensatory damages of $1,000 for intentional infliction of emotional distress. *Id.* Another individual defendant, Sharon McLeod, was found not liable for compensatory damages, but was assessed punitive damages of $1,000. *Id.* The jury also awarded Beard punitive damages against McMullen ($70,000), Venusti ($45,000), and Cameron ($45,000). *Id.*

After the jury returned the verdict for Beard, the superior court ruled that our *Beard I* decision had rendered the exhaustion issue res judicata. *Beard II*, 864 P.2d at 544. The superior court entered judgment for Beard.

The defendants appealed. They challenged various superior court rulings, including its decision on exhaustion. *Beard II*, 864 P.2d at 540. We held in *Beard II* that *Beard I* had not conclusively resolved this question, and remanded.

> The superior court erroneously interpreted our decision in *Beard I* as conclusively deciding the

> exhaustion issue. Our decision merely reversed the court's ruling in favor of the State and did not constitute a final determination that Beard was excused from pursuing his remedies under the collective bargaining agreement. Beard never sought summary judgment on this issue and the State never had an opportunity to rebut the evidence presented in Beard's opposition. The doctrine of res judicata does not apply when one party has not had an opportunity to litigate an issue. We therefore remand this issue to the superior court for an evidentiary hearing.

Beard II, 864 P.2d at 545 (citations omitted).

At the remand hearing, Senkow testified that he was very familiar with Beard's grievance history because he had helped Beard process five separate grievances while Beard was employed with DOT. According to Senkow, he had no significant contact with Beard during the summer of 1986, although Beard contacted him in May about a supervisor's request for a sick-leave slip, and at least one of Beard's grievances was pending. Senkow testified that Beard never told him that he was going to quit because his work conditions were intolerable or because his firing was imminent. Senkow also testified that his May 15, 1987, affidavit referred to conversations he had with Beard earlier in the year.

Beard's attorney cross-examined Senkow about his 1991 deposition, where he had testified that he had never considered Beard's work problems to be related or advised Beard to consider a constructive discharge claim. Senkow reiterated his view that Beard's complaints concerning work assignments, sick-leave slips, and "cold-shouldering" were not grievable. He also testified that he

did not see a pattern in the complaints Beard brought to him.

> Q: [by Beard's attorney] Your belief that you can't grieve a year's worth of pattern is consistent with why you didn't grieve the pattern; right?
>
> A: No, that's not correct. That's not consistent. In the context of that deposition and what I was answering at that point, you know – normally when somebody gets disciplined, there's been progressive discipline. That in itself is a pattern. We grieve – we grieve that. So we do grieve a pattern. I mean, we grieve the whole process of progressive discipline. So, I mean, you know, I know we can grieve the whole disciplinary area. That includes investigations and written warnings, suspension, and ultimately termination.
>
> Q: Right. But your statement there that you can't grieve a pattern, you have to grieve an incident. And your testimony we went over. But Mr. Beard wanted to lump these all together and you wanted to keep them all separate.
>
> A: I don't know what. . . .
>
> Q: Those are all consistent with your affidavit. . . .
>
> A: I don't know at what point. . . .
>
> Q: . . . that says he told you about those and you didn't think you could grieve them. Right?
>
> A: I don't know at what point Beard asked me to grieve a pattern. I don't even know if he did. I don't believe he ever did. I treated those incidents all separately because that's the way they came in. There was no pattern to those.

On re-direct, Senkow stated that Beard was familiar with union procedures and that Beard had appealed Senkow's refusal to grieve a March 1986 warning letter to the grievance committee. He also testified that he was unaware that Beard's problems at work were affecting his health. Finally, Senkow reiterated that he would have filed a constructive discharge grievance if Beard had asked him to do so.

Evie Seymore testified that she had been present during at least two of Beard's meetings with Senkow, at which Senkow had refused to grieve various issues.

> I know in one meeting, he talked about the harassment of having to write down his times at work where he had to keep track of his time by hours and write it down. I know he talked about having to submit a sick leave form where no one else in the office has ever had to submit one. And I know he talked to him about he was not given any real work to do, he was basically given very little work. Burle [Beard] was bored and preferred to be working as opposed to sitting there doing nothing. And Bruce [Senkow] said, well, these were all things that he didn't consider as harassment at all, that they were prerogatives of the management. So he wouldn't do anything about them.
>
> . . . .
>
> . . . Each time he managed to get Bruce to finally proceed with [a grievance], they were overturned. But he kept trying to tell Bruce, there's a pattern here. This is happening, this is happening, this is happening, this is happening. But Bruce would only deal with one thing at a time and not perceive it as a pattern.

She also testified that Beard had told Senkow that the situation at DOT was causing him a great deal of stress.

During cross-examination by Beard's attorney, Senkow testified that after quitting, Beard asked Senkow to grieve his final evaluation, and nothing else. As Beard requested, Senkow grieved the final evaluation.

At the close of the hearing, the superior court ruled that the union knew or should have known that Beard wanted to grieve his overall work situation at DOT even though Beard did not use the specific term "constructive discharge."

> The Court finds that the union did not in fact present a grievance to take into account [the] overall context of what was occurring. It's sufficiently clear to the Court that in Mr. Beard's contact with the union, it should have been clear to the union what Mr. Beard wanted. And that was basically to stop the harassment and [present] him an acceptable work place.
>
> As even the testimony of Mr. Senkow indicates, he was fighting the individual battles one at a time and doing well and winning the battles. But they lost sight of the fact that the war was not being waged. Mr. Senkow's affidavit, the original affidavit is pretty clear in the sense that we are not going to arbitrate or grieve the overall situation because it's not grievable. His subsequent testimony is in a different light, in a different context. At the time these events were occurring, it's clear that with respect to many of the – it's the overall course of conduct we're dealing with, not a specific event, that there was a factual inconsistency in evaluation. The fact that he was being shunned by the people at

> DOT, the fact that he was being assigned this and that, although not grievable, certainly was part of the overall factual situation that led to his ultimate termination.
>
> The Court specifically finds that it should have been sufficiently clear to the union that Mr. Beard wanted to correct his intolerable situation at DOT. They did not proceed to represent him in connection with that.

The court also ruled that even if the union had been willing to assist Beard in filing a grievance on these matters, such efforts would have been futile.

> [E]ven if a grievance had been filed on that based on what had occurred in connection with the factual information that occurred at trial as well as the jury verdict, any grievance concerning his work situation, any grievance concerning his termination would have been entirely futile. Even if he had won the grievance and gone back to work, the situation still would not have been corrected. He might have won the grievance, but he still would not have won the war.

Following post-hearing rulings on other issues, the State, Venusti, and McMullen appealed. Beard cross-appealed.

III. DISCUSSION

A. Exhaustion of Administrative Remedies

We have repeatedly held that employees must first exhaust their contractual or administrative remedies, or show that they are excused from doing so, before they

may pursue direct judicial actions against their employers. *See, e.g., Beard II*, 864 P.2d at 545. *See also Voigt v. Snowden*, 923 P.2d 778, 781-83 (Alaska 1996). This policy "promotes judicial efficiency by affording an institution an opportunity to correct its own errors, so as to render judicial action unnecessary." *Eidelson v. Archer*, 645 P.2d 171, 181 (Alaska 1982). *See also Eufemio v. Kodiak Island Hosp.*, 837 P.2d 95, 99 (Alaska 1992) (doctrine of exhaustion of remedies also encourages the development of a factual record and discourages the "deliberate flouting of its processes"). However, an employee may be excused from exhausting administrative remedies if the administrative process is tainted or biased, *Eidelson*, 645 P.2d at 179-83, or if the employee's union refuses to participate in the grievance process. *Beard I*, 796 P.2d at 1348-49; *Casey v. City of Fairbanks*, 670 P.2d 1133, 1136-37 (Alaska 1983).

The superior court ruled as follows on remand:

> The Court finds, number one, that the union was certainly put on notice and was put on notice of what the intolerable situation of Mr. Beard was with respect to the work. That the union did not grieve that aspect of the situation. And number two, even if there was – he failed to present sufficient information to the union so that they were on notice of what he wanted them to do, it would have been futile to grieve that aspect and it's therefore excused.

On appeal, the State asserts that the superior court's ruling is both factually and legally flawed. First, the State asserts that the evidence presented at the remand hearing does not support the court's finding that the union "knew

or should have known" that Beard felt his working conditions at DOT were intolerable at the time he resigned. Second, the State argues that this court's decision in *Casey* requires, at a minimum, that the employee establish that the union explicitly refused to grieve a complaint before the employee can be excused from pursuing administrative remedies. Finally, the State asserts that the superior court misapplied *Casey* in ruling that futility excused Beard from exhausting his administrative remedies.

1. Standard of review

It is within the superior court's discretion to determine whether a particular employee has exhausted the administrative remedies available. *Eufemio v. Kodiak Island Hosp.*, 837 P.2d 95, 98 (Alaska 1992). This court will reverse a ruling for abuse of discretion only when "left with a definite and firm conviction, after reviewing the whole record, that the trial court erred in its ruling." *Id.* (quoting *Morgan v. State, Dep't of Revenue*, 813 P.2d 295, 297 n.4 (Alaska 1991)).

We will review the superior court's conclusions of law using our independent judgment. *Pederson-Szafran v. Baily*, 837 P.2d 124, 127 n.1 (Alaska 1992). The superior court's factual findings will only be reversed if "clearly erroneous." *City of Hydaburg v. Hydaburg Co-op. Ass'n*, 858 P.2d 1131, 1135 (Alaska 1993).

2. Refusal to grieve

An employee may be excused from exhausting administrative remedies if the union refuses to process

the employee's grievance. Casey, 670 P.2d at 1135. In that case, a former building inspector sued the City of Fairbanks for wrongful discharge. The superior court granted summary judgment to the City, ruling that Casey had failed to exhaust his administrative remedies. *Id.* In reversing this ruling, we observed that Casey could not have pursued his grievance without the assistance of his shop steward or supervisor and that those individuals had refused to help him. *Id.* at 1136-37. Therefore we concluded "as a matter of law that Casey made a good faith effort to pursue his grievance. Any further action that Casey could have taken was excused because it would have been futile." *Id.* at 1137.

A majority of jurisdictions have held that a union's refusal to pursue an employee's grievance will excuse the employee's failure to exhaust where

> the union has sole power under the contract to invoke the higher levels of the grievance procedure *and* if the union has prevented the employee from exhausting his remedies by its wrongful refusal to process the grievance.

Croston v. Burlington N.R. Co., 999 F.2d 381, 386 (9th Cir.1993) (emphasis in original) (citation omitted); *see also Vaca v. Sipes*, 386 U.S. 171, 185-86 (1967); *Thompson v. Modernfold Indus.*, 373 N.E.2d 916, 919 (Ind. App. 1978); *Gilstrap v. Mitchell Bros. Truck Lines*, 529 P.2d 370, 374-76 (Or. 1974). Most courts have equated a "wrongful refusal" to process a grievance with a breach of the union's duty of fair representation. *See Thompson*, 373 N.E.2d at 923 (holding that a union breaches its duty of fair representation by conduct which is "arbitrary, discriminatory or in bad faith"); *Gilstrap*, 529 P.2d at 375 (holding that a union

has a duty to protect an employee's rights in good faith and in a nonarbitrary manner).

In this case, the superior court found that based on Beard's contacts with Senkow, the union knew or should have known that Beard wished to grieve his overall work situation and that the union failed to file such a grievance. Like Casey, Beard needed the cooperation of a union representative to process a grievance past the initial steps.[1] Finding that the union failed to grieve, the superior court concluded that Beard was excused from exhausting his administrative remedies. The State asserts that this finding is both clearly erroneous and an improper extension of *Casey*.[2]

Our review of the record leads us to conclude that the superior court erred in determining that Beard is excused from exhausting his remedies. The record suggests that up until mid-May 1986, about three months before he quit, Beard tried to resolve his work conditions through the available grievance procedures. *See Casey*, 670 P.2d at 1136 (holding that employee had made a "good faith" effort to pursue his grievance where the

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[1] Article 10 of the CBA provided for the processing of grievances or "any controversy or dispute arising between . . . an Employee . . . and the Employer." The CBA outlined a five-step process concluding with arbitration. The CBA specified that "GRIEVANCES AT STEP THREE AND BEYOND MUST BE PROCESSED THROUGH APEA BUSINESS REPRESENTATIVES."

[2] The State does not argue that a test other than that announced and applied in *Casey* should apply here or that we should reconsider *Casey*. It is consequently not necessary in this case to reach the issues discussed in the concurring opinion.

individuals required to process his grievance refused to process an employee's complaint). Beard grieved several incidents either on his own or with the union's help in the twelve months before his resignation. At the time he resigned, the union was still processing at least two grievances. The union, through its representative, Senkow, had refused to grieve several of Beard's complaints. Both Senkow's affidavit and his testimony at the hearing indicate that Beard asked Senkow to grieve various aspects of his work environment, but that Senkow told him that such matters were not grievable since these actions might be considered management prerogative.[3] For example, Senkow refused to grieve Beard's complaint about a supervisor who had required Beard to justify his use of sick leave in May 1986. Seymore's testimony also indicates that Senkow refused to grieve two of Beard's complaints, including his complaint that his supervisors forced him to keep detailed time sheets and avoided assigning work to him. Seymore also testified that Senkow refused to see a "pattern" in the conduct of Beard's supervisors.

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[3] Senkow affied:

> Mixed in with my discussions with Mr. Beard were his complaints that one or more of his supervisors were trying to harass him by using work assignments, apportioning the workload and otherwise structuring his work environment so as to make it as uncomfortable as possible. I explained to him that this is not a grievable matter as it is not provable by the correspondence and personnel file documents and is, on its face, one of those areas that is left to management prerogative.

Nonetheless, Beard last asked the union to grieve his work conditions several months before he resigned. (He last sought union assistance concerning work conditions in May 1986, and resigned on August 22, 1986.[4]) Following termination, Beard did not renew any earlier request that the union grieve a pattern and did not ask the union to grieve his resignation as a termination or constructive discharge. His only post-termination grievance request related to the "bad" final evaluation, not work conditions. Senkow testified that he would have filed a constructive discharge grievance had Beard asked him to do so. Because Beard never asked the union to grieve his departure from office, the union was never given a chance to participate in the grievance process with respect to Beard's resignation. *See Casey*, 670 P.2d at 1136-37.

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[4] Beard claimed that his work conditions amounted to supervisor harassment. In *Beard I* we held that evidence of the Union's failure to grieve what Beard claimed was a pattern of harassment excused his failure to grieve his constructive termination claim, requiring that the summary judgment entered for defendants be set aside. 796 P.2d at 1349. In *Beard II* we remanded for determination of whether Beard's failure to grieve was excused. 864 P.2d at 545. We assumed in both opinions that evidence of Union refusal to grieve claims of harassing work conditions was relevant to whether Beard was excused from asking the Union to grieve a claim that those conditions forced him to resign. Only upon remand following *Beard II* was the disputed futility issue tried with full opportunity to offer evidence on whether a pre-resignation refusal to grieve particular complaints of harassing conduct excused Beard from failing to ask the Union after he resigned to file a grievance that would have claimed that harassing conduct forced him to quit.

Where an ongoing pattern of harassment in the workplace culminates in an employee's resignation, the employee must attempt to grieve this involuntary termination even if the union has previously been unresponsive to the employee's complaints of harassment. In other words, the union must be afforded a reasonable opportunity to represent the employee, and the employer must be given an opportunity to remedy any wrongs through non-judicial means. To hold otherwise would undermine this court's strong policy favoring the resolution of labor disputes through administrative procedures.

Given the facts, we hold that the superior court's findings that Beard made a good faith effort to file grievances and that the union did not support him in his effort were clearly erroneous with respect to an incipient constructive discharge claim. We therefore hold that the superior court abused its discretion in ruling that Beard's failure to exhaust his administrative remedies was excused under *Casey*.

3. Futility

The superior court reasoned that even if Beard had exhausted his remedies and filed and won a grievance and gone back to work, the "situation still would not have been corrected. He might have won the grievance, but he would not have won the war."

We cannot conclude that a successful grievance would have provided Beard with a remedy so inadequate as to render futile his pursuit of the grievance procedure. Had Beard successfully grieved a constructive discharge,

he would have been entitled to reinstatement with back pay. Even if we assume that reinstatement would have returned him to the same unsatisfactory environment, recovery of back pay for the period he was off work would nonetheless have given him a substantial remedy and would also have tended to discourage further harassing conduct by supervisors. Continued harassment would presumably have led to further successful grievances, up to and including another successful constructive discharge claim, leaving the State with the prospect of having a vacant position in the interim, or potentially paying both a salary to a replacement employee and back pay to Beard. The record reflects that Beard's collective bargaining agreement contained a five-step grievance process culminating in binding arbitration. Article 10, section 2, paragraph 3 of the CBA states: "The arbitrator shall have the power to return a grievant to employee status with or without restoration of back pay, or mitigate the penalty as equity suggests under the facts." There was no evidence reinstatement with back pay was beyond the authority of the arbitrator. Further, the record reflects that Beard had successfully used the grievance process in the past. Senkow testified that he had processed five grievances for Beard and was successful in each case. The demonstrated success of the grievance process on those occasions refutes any argument that the grievance process was doomed to failure. In the absence of evidence that reinstatement and a monetary remedy were not available administratively, the superior court's conclusion of futility is wrong as a matter of law.

We also note that the superior court's decision makes a fundamental assumption about something that should

not be assumed: that the arbitrator could not have provided an adequate remedy. Article 10, section 1 of the CBA extends the agreement to "any . . . controversy or dispute having occasion to arise between the parties." Article 10, section 7 stipulates that "the arbitrator shall have the authority to rule on arbitrability issues. . . . " In the first instance, it was the arbitrator who had the authority and responsibility to determine the scope of the arbitrator's powers. Beard cannot base his futility argument on the theory the CBA did not allow the remedy he seeks when it was his failure to exhaust which prevented an arbitrator from deciding whether that remedy was administratively available. Because the CBA itself did not prevent the arbitrator from fashioning an adequate remedy, Beard cannot assert futility as an excuse for failing to exhaust his administrative remedies.

4. Claims against McMullen and Venusti

McMullen and Venusti argue that the superior court should have dismissed the claims against them as individual defendants because Beard did not exhaust his administrative remedies. They assert that the conduct Beard complains of was subject to the CBA grievance process. Beard does not argue that the intentional infliction of emotional distress (IIED) claims were not subject to the CBA grievance requirements. Beard has not asserted that an unexcused failure to exhaust that would bar his claims against the State would not also bar his

IIED and constructive discharge claims against Venusti and McMullen.[5]

Although the dissent, in resolving the exhaustion issue, would distinguish between Beard's IIED claims

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[5] McMullen, Venusti, and the State moved to dismiss Beard's IIED and constructive discharge claims for failure to exhaust administrative remedies. Beard opposed on the ground his failure was excused by the Union's refusal to represent him. He did not argue in the superior court that even if the CBA grievance procedure and authority of the arbitrator covered his State claims, they did not encompass his claims against his supervisors. The superior court dismissed his claims on failure-to-exhaust grounds. We reversed in *Beard I* because it appeared there was a genuine fact dispute about whether the Union had refused to represent Beard on a claim that there was a pattern of harassment leading to constructive discharge. Beard argued in the *Beard I* appeal that none of his claims was arbitrable, but did not argue that even if his claims against the State were arbitrable, his claims against Venusti and McMullen were not. He did not argue in that appeal there that even if summary judgment for the State were affirmed, it should be reversed as to the supervisors.

Nor did Beard argue the issue in *Beard II*. Neither previous appeal raised a question whether a failure to exhaust might bar Beard's claims against the State but not his claims against individual supervisors. Both prior opinions tacitly assumed that the exhaustion issue applied equally to the IIED and constructive discharge claims against all defendants. The only dispute about the effect of the CBA was whether the arbitrator could fashion an adequate remedy, not whether the CBA was inapplicable to particular claims against the individual defendants even if it applied to claims against the State.

Beard argues in the present appeal that futility was proven because Senkow refused to grieve the supervisors' acts. He thus implicitly argues that the CBA grievance procedures encompassed the supervisors' wrongful acts.

against Venusti and McMullen and his constructive discharge claims, Dissent at 31-32, Beard does not ask us to draw that distinction.

The dissent also suggests that the union's refusal to grieve a pattern of harassment excuses Beard's failure to exhaust his remedies with respect to the IIED claims. Dissent at 32. Several circumstances convince us otherwise. The union did agree to represent Beard on some grievances, and two grievances were still being processed when Beard resigned in August. After he resigned, the union complied with Beard's request to grieve the final evaluation issue. Nonetheless, after mid-May 1986 Beard never asked the union to grieve his work conditions, including the resignation itself or the post-May conduct that allegedly precipitated his resignation. Because he did not timely ask the union to pursue the work conditions that were central to his IIED claims, he is not excused from failing to exhaust his remedies.

We consequently hold that the unexcused failure to exhaust that bars Beard's claims against the State also bars his claims against McMullen and Venusti. The well-recognized principles favoring exhaustion apply equally to claims against supervisors who engaged in the tortious conduct that formed the basis for Beard's State IIED and constructive discharge claims. The judgment against Venusti and McMullen must therefore be set aside.[6]

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[6] Because we conclude that the claims resulting in compensatory damages awards against McMullen and Venusti were barred by the exhaustion doctrine, the compensatory damages awards against those defendants must be vacated. It follows that the substantial punitive damages awards against those defendants must also be set aside.

B. Other Issues

Our resolution of the exhaustion question moots the remaining issues raised in the appeal and Beard's cross-appeal. Thus, vacating the judgment against the State, Venusti, and McMullen moots any dispute about when prejudgment interest began to accrue and whether an enhanced rate applied. It also moots the Civil Rule 60(b)(6) relief issue raised by McMullen and Venusti, and Beard's argument that the State's agreement to indemnify Venusti and McMullen is invalid because it violates public policy.

IV. CONCLUSION

We conclude that the superior court abused its discretion in finding that Beard's failure to exhaust his administrative remedies was excused. We therefore REVERSE the judgment and REMAND with instructions to enter judgment for the State, Venusti and McMullen.

RABINOWITZ, Justice, concurring.

Although I agree that the superior court's judgment should be reversed and judgment entered for appellants and cross-appellees, I disagree with the court's reliance on *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983), in Section III.A.2 of the court's opinion. My reasons are as follows.

The court explains in Section III.A.2 that an employee's failure to exhaust administrative remedies is excused by the union's refusal to pursue a complaint when

> the union has sole power under the contract to invoke the higher levels of the grievance procedure *and* if the union has prevented the employee from exhausting his remedies by its wrongful refusal to process the grievance.

Op. at 11 (quoting *Croston v. Burlington N.R. Co.*, 999 F.2d 381, 386 (9th Cir.1993)). The court further explains that "[m]ost courts have equated a 'wrongful refusal' to process a grievance with a breach of the union's duty of fair representation." Op. at 11.

In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court of the United States reviewed a court's determination that an employee's failure to exhaust his arbitration remedies was excused. The Missouri Supreme Court relied on the fact that the jury found the employee's claim meritorious and thus held that the union must have breached its duty of fair representation by not grieving the claim. *Id.* at 192-93. The federal high court reversed.

Vaca begins by emphasizing the employer's interest in having employees adhere to agreed-upon grievance procedures; arbitration saves the employer the expense of litigation. *Id.* at 191-92. The Supreme Court also noted the contradiction in allowing a union's breach of duty to excuse an employee's failure to exhaust, since the employer "may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement." *Id.* at 185. *Vaca* nevertheless concludes that to leave the employee remediless whenever the union fails to grieve would lead to "great injustice." *Id.* at 185-86.

The Supreme Court therefore settled on a standard that allows the employee to institute judicial proceedings only when the union's refusal to pursue his claim is wrongful. *Id.* at 185. In other words, the refusal must amount to a breach of the union's duty of fair representation. *Id.* at 190. The Court emphasized that it did "not agree that the individual employee has an absolute right to have his grievance taken to arbitration. . . . " *Id.* at 191.

By insisting on this elevated standard, the Supreme Court sought not only to protect the employer's rights under the agreement, but also to preserve the union's discretion in deciding which complaints will be pursued. "[F]rivolous grievances" are weeded out early when "the union [has] discretion to supervise the grievance machinery and to invoke arbitration. . . . " *Id.* In other words, the union acts as a gatekeeper. It must, "in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances." *Id.* at 194. In detailing the policies underlying preservation of union discretion, *Vaca* states:

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. It can well be doubted whether the parties to collective bargaining agreements

> would long continue to provide for detailed grievance and arbitration procedures . . . if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration.

Id. at 191-92 (footnote and citations omitted).

The Supreme Court went on to conclude that the plaintiff employee in that case could not establish a breach of the union's duty of fair representation "merely by proof that the underlying grievance was meritorious"; the employee "must also have proved arbitrary or bad-faith conduct on the part of the Union in processing his grievance." *Id.* at 195, 193.

Vaca's emphasis on the union as gatekeeper, with discretion to determine which complaints will go forward, is consistent with decisions both before and since. The Supreme Court had previously established that "individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and union. . . . [T]here can be no doubt that the employee must afford the union the opportunity to act on his behalf." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965). It had also made clear that the union does not breach its duty of fair representation so long as it acts "honestly, in good faith and without hostility or arbitrary discrimination." *Humphrey v. Moore*, 375 U.S. 335, 350 (1964); *see also Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (emphasizing "hostile discrimination" based on "irrelevant and individious [sic]" considerations; no exception if union

exercised good faith within "wide range of reasonableness").

In subsequent decisions, the Supreme Court has reiterated that exceptions to mandatory arbitration require "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. . . . " *Amalgamated Ass'n of St., Elec., Ry. and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971). The Court hinted that a showing of negligence would not be sufficient. "[T]he burden of demonstrating breach of duty by the Union . . . involves more than demonstrating mere errors in judgment. . . . The grievance processes cannot be expected to be error-free." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976). At the core of these cases lies the principle that unions must be allowed to make independent determinations as to the merits of individual claims. "[U]nion discretion is essential to the proper functioning of the collective-bargaining system." *International Bhd. Elec. Workers v. Foust*, 442 U.S. 42, 51 (1979).

In *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990), the Supreme Court announced that while the duty of fair representation is of major importance,

> a breach occurs "only when a union's conduct toward a member . . . is arbitrary, discriminatory, or in bad faith." The courts have in general assumed that mere negligence . . . would not state a claim for breach of the duty of fair representation, *and we endorse that view today.*

Id. at 372-73 (emphasis added) (citation omitted) (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)).

Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65 (1991), affirms and elaborates:

> We hold that the rule announced in *Vaca v. Sipes* – that a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith" – applies to all union activity. . . . We further hold that union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness" as to be irrational.

Id. at 67 (citations omitted) (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). *O'Neill* went on to direct courts not to substitute their own judgment for that of the unions. "Any substantive examination of a union's performance . . . must be highly deferential. . . . " *Id.* at 78.

The standard which emerges from this fairly consistent line of cases is that a union's decision not to pursue an employee grievance is reviewed only for an abuse of discretion. A union's refusal to grieve constitutes a breach of duty only when it stems from an improper motive or lacks a rational basis. As the gatekeeper to arbitration, the union must be allowed to independently decide which claims are meritorious and should go forward. Judicial review is deferential.

Burle Beard cannot meet this standard. There is no evidence that union representative Senkow's decision not to grieve Beard's claims as a pattern was the product of an improper motive. Nor can Beard show the decision

was irrational. At the exhaustion hearing, Senkow himself testified that he had not discerned a pattern in the complaints Beard had brought to him.

Senkow also refused to grieve several of Beard's individual claims. Among these were complaints that a supervisor had asked Beard to justify his use of sick leave in May 1986, that he was forced to keep detailed time sheets, and that the supervisors avoided assigning work to Beard. The union's several refusals neither individually nor in combination constitute an abuse of discretion. The record contains absolutely no evidence that Senkow's decisions were the result of an improper motive, nor does Beard so allege. The only possible basis for finding that the union acted wrongfully is that the decisions were irrational.

Senkow's decisions had a rational basis. Senkow affied [sic] that he did not pursue the several individual claims because he felt they were "not provable" and the actions fell within "management prerogative." And both Senkow and Beard's witness testified that Senkow did not pursue the pattern complaint because he did not perceive a pattern of harassment against Beard.

As to the individual claims, Senkow's explanation for his refusal is in and of itself rational. The actions which Beard complained of – requiring detailed time sheets, justifying sick leave, and apportioning work load – are all decisions which management is generally entitled to make. Senkow could have rationally concluded that Beard's complaints would not have supported a successful grievance and should not be pursued. His determination that these actions were not provable as harassment

because they fell within management discretion, while not necessarily correct, is not irrational. Furthermore, as discussed below, Senkow had reason to doubt Beard's interpretation of events.

As to Beard's pattern complaint, both parties' evidence indicates that Senkow simply did not perceive a pattern of harassment where Beard did. Senkow's skepticism of Beard's charge of a unified management conspiracy had a rational basis. Senkow's interactions with Beard and the events leading up to Beard's resignation could have led Senkow to conclude that Beard was unduly sensitive and there was no "pattern" against him. None of the evidence available to Senkow conclusively established the existence of an organized campaign.

The evidence which was available to Senkow could either have led him to conclude that Beard was the victim of management orchestrations or that he was a troublemaker. In support of the latter, Beard had charged that Milt Lentz, the Director of the Department of Transportation, had lied about a conversation with Beard during a visit to the office in May 1986. *Cameron v. Beard*, 864 P.2d 538, 543 n.4 (Alaska 1993) (*Beard II*). However, it is entirely understandable that Senkow could decline to believe that the alleged conspiracy against Beard went to the highest levels of the Department of Transportation. Furthermore, the implausibility of the charge could also have led Senkow to discount Beard's other allegations, and to conclude that Beard was overly suspicious of his superiors. Senkow's decisions were not "wrongful." Beard cannot demonstrate that "in light of the factual and legal landscape at the time of the union's actions, the

union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *O'Neill*, 499 U.S. at 67 (citation omitted) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). Nor does the fact that a jury ultimately found Beard's claims meritorious justify his failure to exhaust. This is precisely the argument that was rejected by the Supreme Court in *Vaca*.

In my view, *Vaca* articulates a reasonable standard for determining when an employee's failure to exhaust administrative remedies is excused. The *Vaca* test essentially determines when the employer will be denied the protections of mandatory arbitration because of something the union did. It is reasonable to accord the union discretion over which complaints should be pursued. As a gatekeeper, the union preserves the integrity of the arbitration process by screening out frivolous complaints. If courts did not defer to union decisions, and a union refusal always allowed the grievant to go to court, employers would have little incentive to enter into arbitration agreements in the first place. In this regard, I find the Supreme Court's reasoning compelling. *See Vaca*, 386 U.S. at 191-92.

Furthermore, the standard for exceptions to exhaustion articulated in *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983), is arguably incorrect. Despite this court's acknowledgment of federal preemption, *Casey* adopted the test articulated in *Eidelson v. Archer*, 645 P.2d 171 (1982), which asks only whether the employee made a good faith effort to seek arbitration. *Casey*, 670 P.2d at 1136. *Eidelson* is inapposite. That case did not involve a collective bargaining agreement and the plaintiff was not dependent on a union for access to administrative

remedies. In fact, the plaintiff there was not even a member of a labor union. *Eidelson* involved a doctor's challenge to a private hospital's termination of his staff privileges. *See Eidelson*, 645 P.2d at 172-75. This situation is entirely outside the scope of the Labor Management Relations Act. *Eidelson* is simply an application of the general rule that "an aggrieved member of a private association must exhaust the remedies provided by the organization before seeking judicial action against the association." *Id.* at 179. The policy driving the decision was that internal remedies allow an organization to apply its expertise and correct its own errors. *Id.* at 176. The *Eidelson* standard has nothing to do with *Vaca*: no labor union was involved, the doctor had direct access to administrative remedies, and it was unnecessary to determine if a union's refusal to grieve was wrongful. *Casey*'s reliance on that case is misplaced. Since I am of the view that *Casey* is in conflict with binding federal law, I would disapprove it.[1]

COMPTON, Chief Justice, dissenting.

I. IIED

I accept, *arguendo*, the court's characterization of *Beard I* and I assume as well that the court is correct in

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[1] This court has held that the federal common law of collective bargaining, including the rules for exceptions to mandatory arbitration, are binding in state cases. *See International Bhd. of Teamsters, Local 959 v. King*, 572 P.2d 1168, 1172 (Alaska 1977) ("Even though this case is in state court, the law to be applied to this issue is federal labor-management common law.").

requiring Beard to exhaust his contractual remedies as to individual defendants. The court nevertheless errs, as a matter of fact, in holding that Beard should not be excused from exhausting his contractual remedies as to his claim for IIED. It may be arguable that Beard failed to exhaust his contractual remedies as to the constructive discharge claim.[1] Beard's resignation was the last essential element of that claim. Beard did not specifically request that Senkow grieve a claim "for constructive discharge" after Beard resigned – after the cause of action arose.

However, Beard's resignation was not an essential element of his claim for IIED. A claim for IIED requires only "(1) that the defendant's conduct was extreme and outrageous, (2) that the conduct was intentional or reckless, (3) that this conduct caused the plaintiff emotional distress, and (4) that the distress was severe." *Cameron v. Beard*, 864 P.2d 538, 548 (Alaska 1993).

Beard did request that Senkow grieve the "pattern of harassment" against him. It is this pattern of harassment which supports both the IIED claim and the constructive discharge claim. Although it is arguable that the constructive discharge claim did not arise until after Beard resigned, no such argument can be made as to the IIED claim. Senkow explicitly refused to recognize the pattern of harassment alleged by Beard, which supports his claim for IIED. Under even the court's stringent interpretation of *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983), Beard has complied with the requirements for excusing

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[1] *But see, infra*, Parts II and III.

his failure to exhaust his contractual remedies as to his IIED claim.[2]

The court fails to adequately explain why it requires Beard to have asked the union to grieve conduct that occurred "after mid-May 1986." Op. at 18. The pattern of harassment alleged by Beard *prior* to that time is sufficient to support his claim for IIED. Senkow's explicit refusal to grieve this pattern of harassment is sufficient to satisfy the court's interpretation of *Casey*. The court's assertion that Beard "did not timely ask the union to pursue the work conditions that were central to his IIED claims," Op. at 18-19, is inaccurate. The judgments against McMullen and Venusti should be affirmed.

II. Constructive Discharge

The rule laid down by the court is a harsh one:

> Where an ongoing pattern of harassment in the workplace culminates in an employee's resignation, the employee must attempt to grieve this involuntary termination *even if the union has previously been unresponsive to the employee's complaints of harassment.*

Op. at 14 (emphasis added). In the instant case, we have an employee who consistently requested that his union representative aid him in grieving a pattern of harassment. His union representative consistently denied that

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[2] "*Casey* requires, at a minimum, that the employee establish that the union explicitly refused to grieve a complaint before the employee is excused from pursuing administrative remedies." Op. at 9.

such a pattern existed or was grievable. Nonetheless, this court requires Beard to know that such a pattern becomes grievable when he is actually forced to resign. Had Beard but known to invoke the magic words "constructive discharge" following his resignation, he would not be faced with this appeal.

This formalistic reasoning leads to an unjust result. It requires employees to possess both specific legal knowledge and unreasonable tenacity. Beard made a good faith effort to resolve his overall working conditions through the available grievance procedures. His union failed to come to his aid. We should require no more than this before permitting employees to turn to the courts for the assistance that their unions refuse to provide.

III. Law of the Case

That said, I adhere to the view I expressed in *Cameron v. Beard*, 864 P.2d 538 (Alaska 1993) (*Beard II*). In *Beard II* I dissented from the court's decision to remand for an evidentiary hearing on the issue of whether Beard was excused from exhausting his contractual remedies. *Id.* at 551-53 (Compton, J., dissenting). My position was that this issue was raised and resolved in *Beard I*. *Id.* at 551. I remain convinced that in *Beard I* this court "unqualifiedly and unconditionally held that Beard was excused from exhausting his contractual remedies." *Id.* at 552. *See Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758, 763 (Alaska 1977) ("The doctrine of the law of the case prohibits the reconsideration of issues which have been adjudicated in a previous appeal in the same case.").

I dissent.

Harold A. CAMERON, Sharon McLeod, William B. McMullen, and Caroline Venusti, individually and as employees of the State of Alaska; and the State of Alaska, Appellants,

v.

Burle B. BEARD, Appellee.

No. S-5152.

Supreme Court of Alaska.

Dec. 3, 1993.

Rehearing Denied Jan. 18, 1994.

Before MOORE, C.J., and RABINOWITZ, BURKE, MATTHEWS and COMPTON, JJ.

OPINION

MOORE, Chief Justice.

I. *Introduction*

In this appeal, the State and four individual defendant supervisors challenge the jury's verdict in favor of Burle Beard, a former Department of Transportation employee, on his claims of constructive discharge and intentional infliction of emotional distress (IIED).

The State maintains that the superior court erred in interpreting this court's decision in *Beard v. Baum*, 796 P.2d 1344 (Alaska 1990), as conclusively establishing that Beard was excused from exhausting the administrative remedies provided under his collective bargaining agreement. The State also asserts that Beard's constructive discharge claim was barred by an earlier workers' compensation Compromise and Release. In the alternative, the State argues that the superior court erred in denying

its motion for directed verdict/judgment n.o.v. on the constructive discharge claim.

The individual defendants argue that the court erred in denying their motions for directed verdict/judgment n.o.v. on the IIED claims. Alternatively, they argue that the court erred in denying their motion for summary judgment on the ground that they were immune from suit as officials of the state. Finally, both the State and the individual defendants appeal the court's denial of their motions for a new trial and remittitur.

II. *Facts and Proceedings*

Except for a one-year interruption due to injury, Burle Beard worked for the state Department of Transportation (DOT) from 1966 until he retired in 1986. After 1975, Beard worked in DOT's Right of Way section in Fairbanks. In all of Beard's job performance evaluations from 1966 to 1985, his performance was rated as either acceptable, high acceptable or outstanding.

In April 1985 Beard became the Alaska Public Employees Association (APEA) building representative. Believing that some of his supervisors and co-workers were violating DOT personnel rules, Beard began an informal investigation into departmental abuses. Beard looked for evidence to back up his suspicions that DOT personnel routinely falsified time sheets and leave slips and misused state time and property. He reported his findings to a number of state and federal agencies.

In June 1985, Caroline Venusti, the DOT personnel director, learned of Beard's allegations from a labor relations expert in the Department of Administration. Venusti met with Beard the same day. Venusti also arranged a meeting between Beard and William McMullen, the DOT regional director. At this meeting, Beard outlined his allegations to McMullen, and McMullen told Beard that he was going to appoint an investigator to review the situation. McMullen then asked DOT's Internal Review Section to investigate Beard's claims.

Beard claims that once his allegations of misconduct became known, his supervisors began a purposeful campaign to force him off the job. The day following his meeting with McMullen, an unidentified APEA member asked for a new election for building representative. Beard was subsequently voted out of the position. Later that month, Sharon McLeod, a Right of Way supervisor, completed Beard's annual job performance evaluation and rated his performance as "low-acceptable." She noted that Beard spent too much time attending to unassigned and non-job related tasks and improperly copied the time sheets of another employee. McLeod also observed that the Federal Highway Administration had not rescinded its refusal to accept Beard's appraisals. McLeod's evaluation indicated that Beard would be re-evaluated quarterly and suggested strictly controlling his work assignments to ensure that he followed his supervisor's instructions. Beard grieved this evaluation.

In August, McMullen met with Beard and gave him a copy of Internal Review's final report concerning Beard's allegations of departmental abuses. The report concluded that only two of the twenty-one allegations which Beard

had made were substantiated. Beard expressed his dissatisfaction with these findings and went public with his allegations.

A month later, Beard met with McMullen, Venusti and APEA representatives to discuss Beard's continuing campaign to have his allegations investigated by non-DOT personnel. At the close of the meeting, Beard agreed only to discuss his allegations with those individuals or agencies which he had previously contacted. However he told McMullen that he would still send a letter concerning his charges to the Fairbanks District Attorney because he had already drafted it.

McMullen later discovered that Beard had a DOT secretary type this letter. When confronted with this discovery, Beard initially lied to McMullen and told him that his girlfriend had typed the letter. McMullen suspended Beard for thirty days for lying about the incident. Beard grieved this suspension, and it was subsequently reduced to seven days through a settlement between the APEA and the State. Beard received three weeks back pay as a result of the settlement.

In October McLeod performed a quarterly evaluation of Beard and rated his performance as "low-acceptable." McLeod based her negative evaluation on Beard's suspension, his failure to follow directions when doing appraisals and his need to develop a "teamwork job attitude." However she also noted that Beard had fulfilled some of the goals set out in his previous evaluation. She no longer required Beard to fill out hourly time sheets but suggested that he be re-evaluated in three months. Beard grieved this evaluation.

In February 1986 Stephen Sisk, who temporarily replaced McMullen as acting regional director, gave Beard a written warning that he would face severe disciplinary action unless he stopped harassing his co-workers with his continuing allegations of departmental corruption.[1] Beard grieved the warning memo and requested copies of the underlying complaints.

Also in February, the Division of Personnel concluded its grievance review of McLeod's July evaluation of Beard. It ordered DOT to have Beard's evaluation redone by Richard Kendall, Beard's supervisor in Engineering, because McLeod had only been Beard's supervisor for 16 days of the annual evaluation period. Kendall completed the evaluation in March and rated Beard's performance as acceptable in all categories. Both McLeod and McMullen added critical comments to the evaluation.

In March McLeod completed her third evaluation of Beard and rated his job performance as "acceptable" but rated his interpersonal relationships with co-workers as "unacceptable." McLeod cited continued disruptive behavior by Beard, referring to the February warning

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[1] The basis for this warning was a series of remarks Beard made during an after work gathering at a local bar. Beard told several DOT employees that he had successfully grieved his 30 day suspension. He also expressed his hope that his rebuttals to McLeod's evaluations would be placed in her personnel file. McMullen learned of these remarks and requested memos from three employees detailing these comments.

letter and new employee complaints.[2] Beard again grieved the evaluation.

McMullen issued Beard a final warning about "disruptive behavior" in May. The warning cited a memo by visiting DOT director, Milt Lentz, which stated that Beard had initiated a discussion of the office situation with Lentz and had told him that he planned to sue the state and buy a sailboat with the settlement. Also in May, McLeod required Beard to supply a doctor's certificate to justify his use of sick leave. This was the first time Beard had ever been asked to provide such a certificate.

Beard resigned from DOT in August 1986. According to Beard, his current supervisor, Jerry Apple, told him that McMullen was in the process of preparing a termination letter and suggested that Beard take action to protect himself. Beard immediately wrote out his resignation and submitted it the next day. Following Beard's retirement, Apple completed a final evaluation of Beard which again critically rated his performance.

Beard filed a workers' compensation claim several days after his resignation. The basis for his claim was "persistent mental stress with acute and chronic back and neck pain" caused by "continuous on-the-job harassment."

While this workers' compensation claim was pending, Beard filed a complaint against McMullen, alleging

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[2] McLeod cites six employee complaints of "disruption" in the March evaluation. These memos, including one by McLeod herself, briefly recount various comments made by Beard about his successful grievance settlement.

misrepresentation, defamation and IIED. McMullen moved to dismiss the IIED count on the ground that Beard had not exhausted his administrative remedies under the collective bargaining agreement. In May 1987, the superior court granted McMullen's motion and struck this count after Beard failed to file a timely opposition. Beard filed an opposition one day later which included an affidavit from Beard's union representative, stating that he had told Beard that his supervisors' attempt to "harass him by using work assignments, apportioning the workload and otherwise structuring his work environment so as to make it as uncomfortable as possible" was not a grievable matter.

A lengthy exchange of motions between the parties ensued. Ultimately, the court permitted Beard to add Cameron, McLeod, Venusti, and the State as defendants. In his amended complaint, Beard also added claims for, *inter alia*, constructive discharge and denial of freedom of speech. The court, however, rejected the constructive discharge and IIED claims, concluding that Beard failed to exhaust his administrative remedies.

Beard appealed to this court on this issue and others. *See Beard v. Baum*, 796 P.2d 1344 (Alaska 1990) (*Beard I*). In July 1990, while this first appeal was pending, Beard endorsed a Compromise and Release (C & R) of his workers' compensation claim and received $13,000 in settlement. A month later, this court issued *Beard I*. We reversed the superior court's dismissal of Beard's constructive discharge and IIED claims and remanded the case for further proceedings. *Id.* at 1348-50, 1353-54.

On remand, the individual defendants moved for summary judgment, arguing that Beard had failed to make out prima facie IIED claims against them. In the alternative, they contended that their status as state officials shielded them from liability under *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150 (Alaska 1987). The State also moved for summary judgment on Beard's constructive discharge claim, asserting that Beard had failed to establish a prima facie case. It also argued that the July 1990 C & R had settled all past, present, or future claims for compensation between the State and Beard arising out of his claims of harassment and forced retirement. Finally the State argued that Beard's constructive discharge claim was barred because he had failed to exhaust his administrative remedies under the collective bargaining agreement.[3]

Judge Hodges denied all these summary judgment motions, stating generally that "there are factual issues to be resolved." However, the court did agree to hear argument on the exhaustion of administrative remedies issue if Beard ultimately prevailed at trial.

At trial Beard testified at length about the activities of his supervisors after his allegations of corruption became public. Beard identified McMullen as the driving force of the effort to force him off the job. He testified that after he rejected the Internal Review report as a "whitewash," McMullen told him that "this is going to look awful bad on anyone's evaluation who proceeds any

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[3] The State based this motion on the February 1991 deposition of Beard's union representative, Bruce Senkow, in which Senkow allegedly contradicts his earlier affidavit.

further than this or brings this up in any way." According to Beard, McMullen then manipulated him into lying about who typed his letter to the Fairbanks District Attorney. He also testified that McMullen told him when he returned to work after this suspension that he would never be promoted "in a thousand years."

Beard further contended that his supervisors began collecting evidence of departmental "disruption" in early 1986 in order to create a pretext for firing him. Beard contended that McMullen solicited memos from DOT employees concerning his comments about the office situation and his grievance settlement and used these memos as the basis for the February 1986 warning letter. He also speculated that the handwritten draft of the final May warning letter circulated in March between McMullen, Venusti and a labor relations expert in the Department of Administration indicates that they were planning to engineer further "disruptive incidents" which would eventually lead to his termination. Beard suggests that the Lentz memo was the product of such a plan.[4]

Both McMullen and Venusti admitted at trial that they solicited memos from various employees concerning

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[4] According to Beard, Milt Lentz completely misrepresented this conversation with Beard. Beard claims that after a "closed-door" meeting with Cameron and McLeod, Lentz approached his desk and immediately asked him about the office situation. Beard denied telling Lentz he planned to sue the state. He also testified that Lentz told him that "the people here, the supervisors here are getting a little bit worried about the situation because someone might actually investigate it. Well just be real careful that someone doesn't come up behind you and blow you away."

Beard. Venusti characterized this activity as "preparing a case against an employee" but denied that it constituted keeping a "secret file" on Beard in violation of DOT personnel rules and the APEA contract.[5] According to Venusti, she resisted Beard's efforts to see these memos in order to protect the confidentiality of the other employees. Both she and McMullen declined to comment on the Division of Personnel's subsequent determination that the evidence of disruption underlying the evaluations and warnings was mostly unfounded.[6]

Sharon McLeod, Beard's supervisor during most of the relevant period, testified that her critical assessments of Beard's job performance were the product of her own observations and complaints voiced by other DOT employees. She testified that she did not discuss her evaluations or her management techniques with either Venusti or Cameron. Harold Cameron, the chief Right of

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[5] The APEA contract expressly states that the keeping of a secret file on an employee is prohibited and requires the contents of a supervisor's performance logs to be shared with employees on a regular basis.

[6] In October 1986 the Division of Personnel completed its review of the February 1986 Sisk warning memo and recommended that all references to the memo and the underlying complaints be removed from Beard's file. In January 1987 a Division of Personnel investigator recommended removing the paragraph citing Beard's disruptive behavior from McLeod's March 1986 evaluation on the grounds (1) that it was based on the Sisk warning and (2) that the other complaints were inconclusive. He also recommended the deletion of comments indicating that Beard had a negative effect on the productivity of the section.

Way agent at the Fairbanks office, testified that he did not take an active role in the evaluation process.

The testimony of Richard Kendall, Beard's supervisor in Engineering, corroborates Beard's story of a prolonged effort to force him off the job. According to Kendall, McMullen called him into his office in January 1986 and told him to write a statement indicating that Beard's activities were disrupting the Engineering section. Kendall testified that despite his unwillingness to comply, McMullen insisted that he write the statement before leaving McMullen's office. After he was directed to redo Beard's July 1985 evaluation, Kendall testified that McMullen met with him four or five times and pressured him to write a negative evaluation of Beard. Kendall testified that, at one of these meetings, McMullen placed Beard's uncompleted evaluation form and Kendall's pending grievance for supervisor pay side-by-side on a desk, indirectly suggesting that his grievance would be affected if he did not write a negative evaluation. Kendall provided the following account of one meeting:

> [McMullen] was pretty intimidating towards me. He would pound his fist on the desk and, you know, stare at me for long periods of time without saying anything. And then he would get up and walk around the room, you know, and look at his plaques on the wall and go stare out the window with his hands behind his back and kind of rock back and forth on his heels, and then ask me what I was going to say in my evaluation again. And all I could say was, you know, "I've already told you I'm going to give him a favorable evaluation." And he said that's not what he wanted to see and that – well, he

> said something about my ability to supervise and that if I did a good evaluation that he was going to see just how good a supervisor I was by coming over to my office unannounced and go through my files, go through my notes, go through my calculations. And he said, "We'll just see what kind of supervisor you are." It was kind of a threat I thought.
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> . . . [H]e made it very clear . . . things weren't going to go very smoothly for me. If I gave Burle a good evaluation, then that meant that everything I did from that point on was going to be scrutinized and there would be possible disciplinary action against me.

According to Kendall, McMullen told him that "Burle's ass is going down the road."

Kendall further testified that, in response to his complaints about McMullen's pressure tactics, another DOT supervisor, Jerry Apple, told him that Cameron had asked him to do a "hatchet job" on Beard.

At the close of Beard's case in chief, the State moved for a directed verdict on Beard's claims against the State and the individual defendants, again arguing that Beard had failed to present sufficient evidence. Judge Hodges denied this motion. The jury returned a verdict in favor of Beard, awarding him $696,571 in lost wages and benefits for the breach of his employment contract. McMullen, Venusti and Cameron were each assessed $1,000 in compensatory damages for IIED (no compensatory damages were assessed against McLeod). The jury awarded no compensatory damages on Beard's first amendment

claim, commenting that money could not compensate Beard for the loss of his freedom of speech. The jury also awarded Beard punitive damages as follows: McMullen – $70,000; Venusti – $45,000; Cameron – $45,000; McLeod – $1,000.

The State subsequently moved for judgment n.o.v., for a new trial and for remittitur. Judge Hodges also denied each of these motions. The court also ruled that this court's decision in *Beard I* rendered the exhaustion of remedies issue res judicata.

III. *Discussion*

A. *Exhaustion of Administrative Remedies*

We have repeatedly held that "an employee must first exhaust his contractual or administrative remedies, or show that he was excused from doing so, before he may pursue a direct judicial action against his employer." *Casey v. City of Fairbanks*, 670 P.2d 1133, 1136 (Alaska 1983), *quoted in Beard I*, 796 P.2d at 1348. In *Beard I*, we reversed the superior court's decision to strike Beard's constructive discharge and IIED claims because Beard had presented evidence suggesting that his union representative had refused to grieve these matters.[7] *Beard I*, 796 P.2d at 1349.

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[7] The State's original motion to dismiss on the pleadings actually functioned as a motion for summary judgment because it incorporated a number of exhibits outside the pleadings. *See* Alaska R.Civ.P. 12(c).

The superior court erroneously interpreted our decision in *Beard I* as conclusively deciding the exhaustion issue. Our decision merely reversed the court's ruling in favor of the State and did not constitute a final determination that Beard was excused from pursuing his remedies under the collective bargaining agreement. *See, e.g., Pedersen-Szafran v. Baily,* 837 P.2d 124, 126-28 (Alaska 1992).[8] Beard never sought summary judgment on this issue and the State never had an opportunity to rebut the evidence presented in Beard's opposition. The doctrine of res judicata does not apply when one party has not had an opportunity to litigate an issue. *See Ferguson v. State Dep't of Corrections,* 816 P.2d 134, 138 (Alaska 1991). We therefore remand this issue to the superior court for an evidentiary hearing.

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[8] In *Pedersen,* an employee filed an original action against the State alleging breach of her employment contract. Her complaint included a statement that she had exhausted the administrative remedies provided in the applicable collective bargaining agreement. *Id.* at 126. The State moved to dismiss the action for failure to establish subject matter jurisdiction on the ground that the employee could only appeal the administrative decision to the superior court. Although the employee filed an affidavit in opposition, stating that she had pursued administrative remedies but that a grievance procedure had not been afforded to her, the superior court dismissed her case. We reversed, holding that the employee's affidavit was sufficient to withstand the State's motion to dismiss. *Id.*

On remand, the employee filed an amended complaint which conceded that she had been afforded an administrative hearing. The State then obtained summary judgment on the exhaustion issue. *Id.* at 126-27. On appeal, we upheld the superior court's grant of summary judgment on the ground that our previous decision did not conclusively determine the employee's right to bring an independent action. *See id.* at 128.

B. *Compromise and Release*

The State contends that the July 1990 workers' compensation C & R bars Beard's constructive discharge claim and that Judge Hodges thus erred in denying the State's motion for summary judgment.[9] When reviewing the denial of a motion for summary judgment, we determine whether there are genuine issues of material fact and whether the moving party deserves judgment as a matter of law. *Criterion Ins. Co. v. Velthauser*, 751 P.2d 1, 2 (Alaska 1986).

A release is interpreted in the same manner as any other contract. *Schmidt v. Lashley*, 627 P.2d 201, 204 n. 7 (Alaska 1981). In the case at bar, the plain language of the C & R signed by Beard consistently limits its scope to

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[9] The State also argues that Beard's exclusive remedy against the State for injury and lost wages is under the Workers' Compensation Act. This argument is unpersuasive. The purpose of the Workers' Compensation Act is to compensate a victim of work-related injuries for the future economic losses which the worker will suffer as a result of the injury. *Wien Air Alaska v. Arant*, 592 P.2d 352, 357 (Alaska 1979), *overruled on other grounds by Fairbanks North Star Borough Sch. Dist. v. Crider*, 736 P.2d 770, 775 (Alaska 1987). In his constructive discharge action, Beard seeks to recover the wages and benefits lost due to the breach of his employment contract. *See also Pichon v. Pacific Gas & Elec. Co.*, 212 Cal.App.3d 488, 260 Cal.Rptr. 677 (Cal.App.1989) (holding that the exclusivity provisions of California's workers' compensation act bar an employee from raising a civil claim for "an 'injury' arising within the course and scope of employment," not a claim for "[e]conomic contract damages incurred independent of any disability").

Beard's rights under the Workers' Compensation Act.[10] Only two sentences even arguably read like a general release of all claims:

> By execution of this release the employee acknowledges his intent to release the employer and its workers' compensation insurance carrier from any and all liability arising out of or in any way connected with the work-related injury referred to above and any known or as yet undiscovered disabilities, injuries or other damages associated with said injury. This Compromise and Release shall be effective in discharging the employer and its workers' compensation carrier of all liability of whatsoever nature for all past, present and future workers' compensation benefits relating to the above-referenced injury.

The California Court of Appeals recently rejected a broad interpretation of a similar workers' compensation release. *See Pichon v. Pacific Gas & Elec. Co.*, 212 Cal.App.3d 488, 260 Cal.Rptr. 677, 686 (1989). In *Pichon*, a discharged employee brought suit against his former employer, alleging, *inter alia*, breach of express and implied contract of employment and IIED. A year after he was terminated, he filed a workers' compensation claim

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[10] *Cf. Martech Constr. Co. v. Odgen Envtl. Servs., Inc.*, 852 P.2d 1146 (Alaska 1993). In *Martech*, we interpreted the scope of a general release very broadly to include all claims related to the disputed transaction and upheld the trial court's grant of summary judgment based on the release. In reaching this decision, we focused on the broad language repeatedly used throughout the release and concluded that all claims arising out of the disputed transaction, not explicitly reserved, were settled as a matter of law. *Id.* at 1152.

for injuries to his "psyche, heart, [and] nervous system" resulting from harassment in the workplace. The workers' compensation board approved a release of his claim for $42,000. *Id.* 260 Cal.Rptr. at 680. The release stated:

> [S]aid employee releases and forever discharges said employer and insurance carrier from all claims and causes of action, whether now known or ascertained, or which may hereafter arise or develop as a result of said injury.

Id. 260 Cal.Rptr. at 686. A typewritten addendum to the printed form included a dismissal with prejudice of the employee's retaliatory discharge and misconduct claims arising under the California Labor Code. *Id.*

The trial court granted summary judgment in favor of the employer finding that the release barred the employee's claims. *See id.* 260 Cal.Rptr. at 680. The California Court of Appeals reversed:

> We conclude that it was . . . error to hold that, as a matter of law, the release of any and "all claims and causes of action . . . as a result of said injury" included [the employee's] claims for wrongful termination which survived summary adjudication. By its terms, the release was directed to claims that arose as a result of the injury described in the release, i.e., the physical and mental injuries [the employee] suffered as a result of harassment on the job and the termination of his employment. We have concluded that the only claims which survived summary adjudication and [the employee's] waiver of any non-economic damages, are limited to economic damages not caused by injuries to [the employee's] psyche. We have also concluded

> that [the employee] would not be entitled to recover any lost wages for any period of time that he was disabled. Thus, the remaining claims cannot be described as claims arising as a result of any compensable injuries to [the employee's] psyche. At the least, there is an issue of fact as to whether the parties intended the release to cover the type of claims [the employee] is now asserting.

Id. 260 Cal.Rptr. at 687.

We agree with the reasoning of the California Court of Appeals and conclude that Judge Hodges was correct in denying the State's motion for summary judgment.[11] We emphasize that an employee is not entitled to recover lost wages in a breach of contract action for any period of time that the employee was disabled and received compensation benefits for the disability. *See Pichon*, 260 Cal.Rptr. at 687.

C. *Constructive Discharge*

The State contends that, as a matter of law, there is insufficient evidence in the record to support the jury's

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[11] The State is incorrect in its claim that Beard must show that the release should be set aside in order to avoid summary judgment on this issue. We have previously held that the party relying on the release must show that the release "was given with an understanding of the nature of the instrument." *Witt v. Watkins*, 579 P.2d 1065, 1069 (Alaska 1978); *see also Schmidt*, 627 P.2d at 204. Only then does the burden shift to the releasor to "show by clear and convincing evidence that the release should be set aside." *Witt*, 579 P.2d at 1070.

verdict on Beard's constructive discharge claim.[12] In *Beard I*, we recognized a cause of action for constructive discharge:

> [W]here an employer makes working conditions so intolerable that the employee is forced into an involuntary resignation, the employer is as liable for any illegal conduct involved therein as if it had formally discharged the employee.

796 P.2d at 1350; *see also Klondike Indus. Corp. v. Gibson*, 741 P.2d 1161, 1166 n. 5 (Alaska 1987). As we observed in *Beard I*, "Beard's claim is that by creating conditions so intolerable as to force him to resign, the state violated its duty under Article 5(c) of the [collective bargaining agreement] to discharge him only for just cause."[13] 796 P.2d at 1350.

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[12] We will reverse a trial court's denial of a motion for judgment n.o.v. only when the evidence, viewed in the light most favorable to the non-moving party, is such that reasonable persons could not differ in their judgment. *City of Whittier v. Whittier Fuel & Marine Corp.*, 577 P.2d 216, 220 (Alaska 1978).

[13] This cause of action should be distinguished from the public policy exception to the employment-at-will doctrine. *See Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380, 382-85 (1988) (discussing the policy concerns courts have relied on in creating an exception to the general rule that an employee at will may be discharged without good cause). While most jurisdictions which have recognized such a cause of action have defined it as a tort, a small minority have defined it as a breach of an implied contractual duty not to discharge an employee for an act done in the public interest. *Compare Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 4 Cal.Rptr.2d 874, 824 P.2d 680 (1992) (recognizing tort cause of action) *and Wagner v. City of Globe*, 150 Ariz. 82, 722 P.2d 250 (1986) *with Sterling*, 743 S.W.2d at 385 (recognizing exclusive contract approach) *and Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 335 N.W.2d 834, 841 (1983).

To establish constructive discharge, an employee has the burden of showing that a reasonable person in the employee's position would have felt compelled to resign. *See, e.g., Christie v. San Miguel County Sch. Dist.*, 759 P.2d 779, 783 (Colo.App.1989); *Reihmann v. Foerstner*, 375 N.W.2d 677, 683-84 (Iowa 1985); *see also Huyen v. Driscoll*, 479 N.W.2d 76, 81 (Minn.App.1991). However the employee need not prove that the employer acted with the specific intent of causing the employee to resign. *Hammond v. Katy Indep. Sch. Dist.*, 821 S.W.2d 174, 177 (Tex.App.1991); *Slack v. Kanawha County Hous. & Redev. Auth.*, 188 W.Va. 144, 423 S.E.2d 547, 558 (1992).

Courts have generally held that criticism of job performance or other management decisions do not, standing alone, create intolerable working conditions. *See Huyen*, 479 N.W.2d at 81 (holding that criticism of job performance is insufficient to establish intolerable working conditions); *Reihmann*, 375 N.W.2d at 683-84 (holding that a reasonable person would not feel compelled to resign merely because his employer decided to relocate his office in a neighboring town). However, a number of courts have upheld constructive discharge judgments where an employer pursues a sustained campaign against an employee. *See Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380, 382-85 (1988) (upholding constructive discharge judgment where a corporate employer engaged in a continuous campaign to force an employee to resign over an 18 month period after the employee reported pricing violations to a governmental agency); *see also Ford v. Alfaro*, 785 F.2d 835, 841-42 (9th Cir.1986) (holding that an employee presented a prima facie claim of constructive discharge where the employer accused the

employee of conspiring to file a complaint with the U.S. Department of Labor; the employer told her he would "get even" and that he did not want her to work for him any longer).

Taking the evidence presented at trial in the light most favorable to Beard, the record indicates that (1) an unidentified person requested a building representative election shortly after Beard began making allegations at DOT and that this election ultimately led to Beard being voted out of office as union representative; (2) Beard's job performance evaluations following his investigation were consistently negative although his previous evaluations had been positive; (3) many of the alleged incidents forming the basis of these negative evaluations were later disproved or explained by an independent review panel; (4) McMullen told Beard that "he would never be promoted in 1,000 years;" (5) McMullen solicited memos from other DOT workers concerning Beard's comments about the office situation and his grievance settlement and then exaggerated the substance of these memos in the February 1986 warning letter; (6) McMullen pressured Kendall to write a negative evaluation of Beard in March 1986; (7) Cameron asked one of Beard's supervisors, Jerry Apple, to "do a hatchet job" on Beard; (8) Venusti kept a "secret file" of memos concerning Beard's alleged disruptive behavior in violation of DOT personnel rules and the APEA contract and resisted Beard's efforts to discover the nature and source of these memos; (9) Milt Lentz solicited Beard's opinion of the office situation and then wrote a memo falsely stating that Beard had spontaneously told him of his plans to sue the state; and (10) one of Beard's supervisors told Beard that a termination letter was being

prepared and that he should "do something quick" before he was fired.

Although recognizing that some of Beard's allegations are pure speculation, we conclude that there is sufficient evidence in the record to support the jury verdict on this issue. *See Sterling*, 743 S.W.2d at 385. This is particularly true in light of Beard's testimony that a DOT supervisor told him that he was about to be fired and suggested that he take immediate action. *Cf. Sheets v. Knight*, 308 Or. 220, 779 P.2d 1000, 1005 & n. 5 (1989) (holding that where an employer tells an employee to resign or be fired, a court can find the resignation to be a constructive discharge).

D. *Intentional Infliction of Emotional Distress*

To state a cause of action for IIED, a plaintiff must establish (1) that the defendant's conduct was extreme and outrageous, (2) that the conduct was intentional or reckless, (3) that this conduct caused the plaintiff emotional distress, and (4) that the distress was severe. *Teamsters Local 959 v. Wells*, 749 P.2d 349, 357 (Alaska 1988). The individual defendants contend that there is insufficient evidence to support the jury's IIED verdicts as a matter of law.

We have adopted the definition of extreme and outrageous conduct set forth in the Restatement (Second) of Torts. *Beard I*, 796 P.2d at 1350.

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible

> bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Id. (quoting *Oaksmith v. Brusich*, 774 P.2d 191, 200 (Alaska 1989)).

Because the jury found for Beard on this issue, we will again review the record in the light most favorable to him. *City of Whittier v. Whittier Fuel & Marine Corp.*, 577 P.2d 216, 220 (Alaska 1978). Nonetheless, whether Beard introduced sufficient evidence to support a prima facie IIED claim against each of the defendants is a threshold question to which we apply an abuse of discretion standard. *King v. Brooks*, 788 P.2d 707, 711 (Alaska 1990); *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454, 456 (Alaska 1985).

(1) *McMullen*

McMullen contends that his activities do not constitute "outrageous conduct" as a matter of law. We disagree. In our view, a reasonable juror could conclude that McMullen's threats, coupled with his behind the scenes efforts to collect evidence of disruptive activity by Beard, is sufficiently outrageous to permit recovery for IIED.

In *King v. Brooks*, 788 P.2d 707 (Alaska 1990), we held that an employee stated a prima facie IIED claim against his supervisor where the supervisor had pursued a "two-year private vendetta" against the employee, causing him

substantial emotional distress.[14] *Id.* at 711. Similarly the Arkansas Supreme Court has upheld an IIED judgment against a supervising city director who engaged in a two-year campaign to force an employee police officer off the job. *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), *cert. denied*, 475 U.S. 1036, 106 S.Ct. 1245, 89 L.Ed.2d 354 (1986).[15]

McMullen's other arguments are equally unpersuasive. There is ample evidence in the record that

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[14] In *King*, the record revealed that King's supervisor (1) created a special performance evaluation for King; (2) assigned King extensive overtime and additional responsibilities; (3) yelled at King and called him a liar; (4) insisted that King undergo a psychological examination in intimidating circumstances; (5) delayed King's return to work after he passed the psychological evaluation; (6) kept King on light duty status contrary to departmental practice; (7) reduced King's rank and status and placed him on probationary review for six months; (8) publicly and falsely accused King of misrepresenting his rank causing King embarrassment and humiliation; (9) altered and amended King's past work evaluations; (10) harassed King and singled him out for negative comments; (11) wrongly accused King of making a false arrest and tape recorded an interview concerning the incident; (12) concealed from King a potentially dangerous situation on campus; and (13) accused King a second time of false arrest and then sought a letter from the district attorney stating that King's involvement had been illegal. *Id.* at 708-09. On the basis of these facts, we reversed the trial court's grant of summary judgment in favor of the supervisor. *Id.* at 711.

[15] In *Hess*, the city director (1) made numerous unfounded complaints regarding the officer's performance, (2) conducted surveillance of the officer's activities, and (3) communicated his threats to fire the officer via a number of different sources. *Id.* 693 S.W.2d at 794-95.

McMullen's activities caused Beard serious emotional distress. We therefore uphold the jury's IIED verdict against McMullen.

(2) *Venusti*

For the same reasons, we uphold the IIED verdict against Venusti. The record indicates that Venusti was present at several of McMullen's meetings with Kendall. She actively solicited memos from a number of employees concerning Beard's comments about his allegations and grievance settlement which were used to bolster the formal warnings issued Beard. She also resisted Beard's efforts to discover the substance of these complaints of "disruption" despite the fact that the APEA contract required such complaints to be shared directly with the employee on a regular basis. Based on this evidence, a reasonable juror could conclude that Venusti worked with McMullen to create a paper trail designed to culminate in Beard's termination, thereby causing Beard serious emotional distress.

(3) *Cameron*

Our review of the record discloses that the evidence against Cameron is merely speculative and circumstantial. Nothing of substance connects Cameron to the activities of McMullen and Venusti or to a plot to drive Beard

from his job.[16] *Cf. Reihmann*, 375 N.W.2d at 681 (where court refused to infer that two defendants had conspired together to force plaintiff's relocation and expel him from the business because no evidence connected the actions of each of the defendants beyond their close business and personal ties). We therefore conclude that the superior court abused its discretion in denying the motion for judgment n.o.v. as to Cameron.

(4) *McLeod*

We also conclude that the evidence fails to support an IIED verdict against McLeod. At trial Beard contended that McLeod's negative evaluations and harassment tactics (e.g., hourly time sheets, quarterly evaluations, limited and controlled work assignments, or the request for a doctor's verification for sick leave) were intended to make his job intolerable and to prevent further investigatory activities. We conclude that McLeod's conduct does

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[16] At trial, Beard testified that Cameron's approval of McLeod's evaluations established that he was part of the plot against him. Beard further suggested that Cameron was aware of and implicitly condoned the misuse of State time and property which Beard sought to have investigated. Finally he speculated that Cameron and McMullen collaborated with Milt Lentz to create the "disruptive incident" which formed the basis of the May final warning. None of this speculation is corroborated. The only evidence even remotely suggesting that Cameron took any action against Beard is Kendall's testimony that Cameron asked another DOT supervisor to do a "hatchet job" on Beard. This evidence is insufficient to establish intentional infliction of emotional distress as a matter of law.

not reach the threshold level of outrageousness. As the Illinois Court of Appeals has observed:

> Personality conflicts, questioning of job performance and job transfers, whether for disciplinary or management purposes, are unavoidable aspects of employment. Frequently, they produce concern and distress for the affected employee. Yet, if the distress from such incidents was deemed so severe that no reasonable person could be expected to endure it, nearly all employees would have a cause of action for intentional infliction of emotional distress.

Heying v. Simonaitis, 126 Ill.App.3d 157, 81 Ill.Dec. 335, 342, 466 N.E.2d 1137, 1144 (1984); *see also Owens v. Second Baptist Church of La Grange*, 163 Ill.App.3d 442, 114 Ill.Dec. 557, 562, 516 N.E.2d 712, 717 (1987) (holding that the fact that a defendant has authority over the plaintiff does not lessen the plaintiff's burden of showing the outrageous nature of the employer's conduct). McLeod, unlike McMullen and Venusti, did nothing more than what her job required her to do – supervise and evaluate Beard's performance. Her conduct, regardless of her motive, is simply insufficient to sustain an IIED verdict. *See Reihmann*, 375 N.W.2d at 681 (suggesting that the relevant inquiry is not whether a defendant was motivated by an improper purpose but rather whether the methods adopted shock the conscience).

E. *Official Immunity*

The individual defendants also argue that Judge Hodges erred in denying their motions for summary

judgment based on official immunity under *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150 (Alaska 1987). Their position is without merit. Under *Aspen*, the individual supervisors have qualified immunity, which shields officials from liability only when their acts are "done in good faith and are not malicious or corrupt." *Id.* at 158. Whether Beard's supervisors acted in good faith is a question of fact which precludes resolution of the issue on summary judgment.[17]

F. *Damages Issues*

(1) *The IIED awards*[18]

The individual defendants contend that the verdicts against them and the corresponding punitive damage awards establish that the jury's deliberations were tainted by passion and prejudice.[19] Alternatively, the individual defendants contend that the punitive damage awards are excessive and should be reduced to less than a 3 to 1 ratio of punitive to compensatory damages. The essence of the

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[17] The individual supervisors dropped this issue after the court denied its summary judgment motion and did not seek to present the immunity issue to the jury. Therefore they have waived any further resolution of this issue. *See Gates v. City of Tenakee Springs*, 822 P.2d 455, 460 (Alaska 1991).

[18] Because we reverse the IIED judgments against Cameron and McLeod, we only address here the propriety of the awards against McMullen and Venusti.

[19] The State contends that the jury was inflamed by Beard's comments concerning his stress caused by the litigation process but offers nothing to back up this contention.

defendants' arguments is that the jury verdicts are "manifestly unfair" because the evidence of IIED against each individual defendant is so slight and the ratio between the compensatory and punitive awards is so great.

This court has refused to prescribe a definite ratio between compensatory and punitive damages. *Ben Lomond, Inc. v. Campbell*, 691 P.2d 1042, 1048 (Alaska 1984). Though comparing punitive and actual damage awards is one way to determine if punitive damages are excessive, other factors, such as the magnitude and flagrancy of the offense, the importance of the policy violated, and the defendant's wealth, are equally important to the determination. *Clary Ins. Agency v. Doyle*, 620 P.2d 194, 205 (Alaska 1980)

We will disturb the trial court's denial of a motion for a new trial or remittitur only for abuse of discretion. *Id.* at 204. Here the jury's award was appropriate in light of the individual defendants' conduct. We therefore affirm the IIED awards against McMullen and Venusti.

(2) *The constructive discharge award*

The State contends that Judge Hodges erred in refusing to grant remittitur on the constructive discharge judgment against it. The State offers no authority for its position that the judgment was excessive, merely asserting that a more appropriate judgment would limit the award to the wages/benefits Beard would have earned from the time of his resignation until 1991 when the State presumes he would have retired at age 55. On the record

presented, we conclude that Judge Hodges did not abuse his discretion in denying the State's motion.

IV. *Conclusion*

To summarize, we conclude that there is sufficient evidence supporting the jury's constructive discharge judgment against the State and affirm the superior court's denial of the State's motion for judgment n.o.v. We also affirm the court's determination that the workers' compensation release does not bar Beard's constructive discharge claim. However, because the superior court erroneously interpreted our decision in *Beard I* as conclusively deciding that Beard's failure to exhaust his administrative remedies was excused, we remand for an evidentiary hearing on this issue. If the trial judge ultimately finds that Beard failed to exhaust his administrative remedies, the constructive discharge judgment naturally would be voided.

We affirm the jury's IIED judgments against McMullen and Venusti but reverse the IIED judgments against Cameron and McLeod. We also conclude that the superior court properly denied the individual defendants' motions for summary judgment based on official immunity. Finally we affirm the superior court's denial of the motions for new trial and remittitur.

AFFIRMED in part, REVERSED in part, and REMANDED.

COMPTON, J., dissents in part.

COMPTON, Justice, dissenting in part.

I dissent because the issue of exhaustion of contract remedies should not be remanded for an evidentiary hearing. This issue was resolved in the prior appeal. Thus there is no basis for remanding the issue for redetermination.

The court states:

> The superior court erroneously interpreted our decision in *Beard I* as conclusively deciding the exhaustion issue. Our decision merely reversed the court's ruling in favor of the State and did not constitute a final determination that Beard was excused from pursuing his remedies under the collective bargaining agreement.

Op. at 545. Although the court suggests that we were reviewing a Civil Rule 12(b) motion to dismiss in *Beard I*, we did not so limit our discussion of the issue:

> Beard *is excused* from grieving his constructive discharge and intentional infliction of emotional distress claims under the CBA because Senkow, his union representative, refused to file a grievance for Beard's allegations of harassment underlying those claims on Beard's behalf.
>
> . . . .
>
> . . . Beard could not comply with the grievance procedures established by the CBA because his union representative refused to represent him. Any such attempt would have been futile. Under these circumstances, *we hold that Beard is excused from exhausting his remedies* under the CBA for his claims of constructive discharge and intentional infliction of emotional distress.

> Since the superior court *erred in concluding that Beard was not excused from exhausting his contractual remedies* as to each of these claims, we must reverse the superior court's decision striking the claims unless they are not legally viable.

Beard v. Baum, 796 P.2d 1344, 1349 (Alaska 1990) (emphasis added). We then concluded that the claim for constructive discharge was legally viable. *Id.* at 1350. As to the claim of IIED, we noted that "[s]ince Beard has presented evidence of harassment and of emotional distress, his claim for intentional infliction of emotional distress may be legally viable. . . . On remand, the court should evaluate this evidence to determine whether it is sufficient to support Beard's claim." *Id.* We did not similarly instruct the superior court to determine whether Beard was excused from exhausting his contractual remedies.

It is not surprising that the superior court read *Beard I* as settling the question of whether Beard was excused from exhausting his contractual remedies. We did not "merely reverse" the superior court's decision and remand for further proceedings. We unqualifiedly and unconditionally held that Beard was excused from exhausting his contractual remedies.

Bruce Senkow was the former APEA Field Representative whose affidavit was used by Beard in opposition to the State's mistitled Motion to Dismiss. In that affidavit, Senkow stated in essence that he had refused to grieve Beard's claims because they were not grievable under the contract. The State did not present any evidence to rebut that statement, or explain that it might have been incorrect or inaccurate as far as certain claims were concerned.

Following our decision in *Beard I*, the State deposed Senkow. In its view Senkow's deposition showed that he would have filed a grievance had Beard asked, but Beard had not. Thus Senkow's earlier affidavit was either incorrect or inaccurate as to certain claims. Based on that deposition, the State concluded that this court had misconceived a material fact. The State promptly filed a belated Petition for Rehearing, as well as a Motion for Late Filing of Petition for Rehearing. We granted the motion, but ultimately denied the petition.

The State's petition was directed solely at the issue of exhaustion of contractual remedies. The State asserted that the issue of futility had not been raised below: "There had been no scrutiny of the facts of Beard's relationship with his union representative at the trial level before appeal." nor had it been raised on appeal: "However, the [supreme] court also found, *sua sponte*, that Beard was excused from grieving his dispute on the grounds that Beard's union representative, Senkow, refused to represent Beard." The State asked this court to "rehear its decision on the futility of Beard's exercise of his contractual remedies." We declined to do so.

If the State was correct, this court should have granted the State's petition for rehearing and afforded appropriate relief at that time. And it should now admit its error. However, the remedy is not now to grant in effect the long ago and far away petition for rehearing. Such a resolution begs disappointed litigants to continue the fray in the hope that at some point in the future they will prevail, even though the issue has long since been decided. Further, it erodes the confidence trial courts should have in effectuating decisions of this court. If our

decision and resolution of the petition for rehearing were correct, as I believe it was, there is no justification for remanding this issue for redetermination.

Regarding the procedural issue, the State argues that it never had an opportunity to rebut the evidence presented in Beard's opposition. Op. at 545. I disagree. The court notes that the State's motion to dismiss was actually a motion for summary judgment. Op. at 545 n. 8. The State acknowledges that "there were opportunities for the state to defend the dismissal, both at reconsideration and on appeal, . . . " The State's only argument is that it did not have the benefit of discovery or factual determinations. However, the State brought the motion to dismiss for failure to exhaust, yet failed to respond to Beard's evidence that he was excused from exhaustion.

Pederson-Szafran v. Baily, 837 P.2d 124 (Alaska 1992), is not controlling. In *Pederson* the court noted that the decision in *Szafran v. State*, Mem.Op. & J. No. 452 (Alaska, May 10, 1989), was based only on *Szafran's* affidavit that she was not afforded grievance rights. *Pederson*, 837 P.2d at 126. The court stated only that " '[t]he superior court therefore erred in dismissing the complaint for lack of subject matter jurisdiction.' " *Id.* (quoting *Szafran*, Mem.Op. & J. No. 452). Following remand, Szafran filed an amended complaint conceding that she had received an administrative hearing. *Id.* at 128. "[G]iven Szafran's concession in her amended complaint that a grievance procedure was in fact afforded her, . . . we conclude that the superior court's grant of summary judgment to the State was not inconsistent with *Szafran I*." *Id.*

In this case the new evidence presented by the State is a deposition by Senkow, which may contradict his earlier affidavit. However, differences in context preclude such a conclusion on this record. This is not a situation in which the grievant has recanted or changed his or her position. Certainly Beard has not.

Furthermore, as a practical matter it seems useless to remand the issue of exhaustion of contract remedies to the superior court. The court will be asked to determine if an administrative appeal to Beard's supervisors would have been futile. These are the same supervisors whom the jury already has found to have engaged in "outrageous" behavior justifying the IIED claim and punitive damages. The answer seems obvious.

Burle B. BEARD, Appellant,

v.

Dan BAUM, Harold A. Cameron, Sharon McLeod, William B. McMullen, Stephen C. Sisk, and Caroline C. Venusti, individually and as employees of the State of Alaska: and The State of Alaska, Appellees.

No. S-3229.

Supreme Court of Alaska.

Aug. 3, 1990.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

MOORE, Justice.

Burle Beard, a State Department of Transportation ("DOT") employee, claims that after he made public allegations of corruption at DOT, his supervisors engaged in a pattern of harassment tactics to force him to resign. Beard filed a complaint in superior court against the state and several individual supervisors alleging various causes of action including: (1) wrongful constructive discharge, (2) intentional infliction of emotional distress, (3) denial of due process, (4) violation of 42 U.S.C. § 1983, and (5) defamation. The superior court struck the first three of these claims from Beard's complaint on the ground that he did not exhaust his remedies under his union's collective bargaining agreement ("CBA"). The superior court granted summary judgment against Beard on the other two claims. Beard appeals each of these

rulings. We affirm in part, reverse in part, and remand for further proceedings.

I. Facts and Proceedings

Burle Beard worked for the Right of Way section of DOT from 1975 until he resigned on August 22, 1986. The terms of Beard's employment were governed by the CBA between the state and the Alaska Public Employees Association ("APEA"). In April 1985, Beard became the APEA building representative. At that time, Beard believed that several of his co-workers and supervisors were violating DOT personnel rules. Beard alleged that they falsified timesheets and leave slips and misused state time and property. The Fairbanks Internal Review Office of DOT investigated Beard's charges. In its final report of August 21, 1985, it concluded that only two of the twenty-one allegations were substantiated. The Office recommended that management prevent these practices in the future.

On August 27, 1985, William McMullen, Director of Design and Construction for the DOT Northern Region, met with Beard and gave him a copy of the report. Beard was disappointed with the findings and referred to the report as a "whitewash" and a "cover-up." After McMullen told Beard that he assumed the internal review was conducted in good faith, Beard said that he would not let the issue drop and intended to go to the media. McMullen responded that DOT would not tolerate any further activities that would have a disruptive effect.

Beard alleges that several of the individuals he charged with wrongdoing engaged in a series of retaliatory "pressure tactics" against him. Beard alleges that two

supervisors, Harold Cameron and Sharon McLeod, voted him out as building representative for APEA. In July 1985, McLeod rated Beard's performance "low acceptable" citing complaints that Beard wasted time and copied other workers' timesheets.[1] Beard also alleges that his supervisors: (1) reduced his workload to mundane busywork assignments, (2) unfairly scrutinized details of his performance, (3) transferred him frequently among different sections of DOT, and (4) falsely accused him of stealing a typewriter.

Bruce Senkow, the APEA field representative, testified by affidavit that Beard complained to him that his supervisors were harassing him at work by apportioning work assignments and structuring his work environment to make it as uncomfortable as possible. Senkow told Beard that these claims were not grievable since they were "not provable by the correspondence and personnel file documents" and because the matters were left to "management prerogative" under Article 5 of the CBA. Beard did not file a grievance making any of these allegations.

Beard alleges that the harassment he endured on the job produced a considerable amount of stress. On February 24, 1986, Beard saw Dr. James R. Simmons at the Virginia Mason Clinic in Seattle on account of back and neck pain. Over the next several days, Dr. Simmons conducted a series of tests to determine the cause of the pain.

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[1] Beard filed a grievance to have the McLeod evaluation removed from his file. After an investigation, the evaluation was removed and replaced by another that also rated Beard "low acceptable."

The tests revealed no adequate physical explanation. On June 5, 1986, Beard related to Dr. Simmons that he was under a considerable amount of stress because of the situation at work. At that time Dr. Simmons opined that Beard's muscle tension and pain stemmed from his "conflicts at work." On his doctor's advice and the advice of Jerry Apple, his acting supervisor, that he would be fired, Beard resigned on August 22, 1986.

On February 26, 1987, Beard filed a complaint in superior court against McMullen alleging misrepresentation, defamation, and intentional infliction of emotional distress. The court dismissed the intentional infliction of emotional distress claim on McMullen's motion on May 9, 1987. McMullen filed a motion for summary judgment on the other two counts. Beard moved to amend his complaint to assert additional claims and join additional defendants including the State of Alaska. Beard alleged the following counts:

I. Intentional, and/or Negligent Misrepresentation

II. Defamation

III. Intentional Infliction of Emotional Distress

IV. Breach of Implied Covenant of Good Faith and Fair Dealing

V. Wrongful Constructive Termination

VI. Denial of Due Process

VII. Denial of Equal Protection of the Laws

VIII. Denial of Freedom of Speech

IX. Violation of 42 U.S.C. § 1983

The court granted Beard's motion to amend but struck counts III, V, and VI from the complaint. Beard moved for reconsideration of the dismissal of the intentional infliction of emotional distress claim of the original complaint as well as the striking of counts III, V, and VI of the amended complaint.

After a series of motions to dismiss and motions for summary judgment, the court issued a Memorandum Decision on November 1, 1988. The court concluded that its original actions were correct on the ground that "Beard's remedy is through the grievance procedure as set forth in the union agreement." The court then granted the state's motion for summary judgment on the rest of the counts. The court granted final judgment against Beard on January 25, 1989 and awarded the state attorney's fees and costs. Beard appeals the court's dismissal of his claims for wrongful constructive termination, intentional infliction of emotional distress, and denial of due process and the court's entry of summary judgment against him on his claims for violation of 42 U.S.C. § 1983 and defamation.

II. Exhaustion of Contractual Remedies

The superior court struck Beard's claims for constructive discharge, intentional infliction of emotional distress, and denial of due process on the ground that he failed to exhaust the grievance procedures specified in the CBA. We have held that "an employee must first exhaust his contractual or administrative remedies, or show that he was excused from doing so, before he may pursue a

direct judicial action against his employer."[2] If we determine that Beard is excused from exhausting his contractual remedies, we still may affirm the superior court's decision to strike the claim from the amended complaint if there is another legal basis for doing so. *See Walt v. State*, 751 P.2d 1345, 1351 n. 6 (Alaska 1988).

Under the CBA, Beard was required to submit any dispute with management to the grievance procedures.[3] Beard is excused from grieving his constructive discharge and intentional infliction of emotional distress claims under the CBA because Senkow, his union representative, refused to file a grievance for Beard's allegations of harassment underlying these claims on Beard's behalf.

Under the collective bargaining agreement at issue in *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983), Casey could not pursue his grievance without the cooperation of his shop steward. 670 P.2d at 1135 n. 1. The

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[2] *Casey v. City of Fairbanks*, 670 P.2d 1133, 1136 (Alaska 1983). When an employee is required to pursue his remedy under a mandatory arbitration clause of a CBA, there is an additional question whether that remedy is exclusive. *See Public Safety Employees Ass'n v. State*, 658 P.2d 769, 772-73 (Alaska 1983).

[3] Article 10, section 1 of the CBA provides that any dispute between an employee and the employer is grievable: "a grievance shall be defined as any controversy or dispute arising between APEA or an Employee or Employees and the Employer." That section also provides that only grievances "which involve[ ] the application or interpretation of the terms of this Agreement . . . may be submitted to arbitration for settlement." We assume without deciding that Beard was required to submit his claims to the grievance procedures even if his claims are not arbitrable.

evidence showed that Casey initially discussed his termination with his shop steward and reported his grievance directly to the union business agent after he was terminated. 670 P.2d at 1135. We held that Casey was excused from exhausting his remedies under a collective bargaining agreement because he made a good faith effort to grieve his termination claim through his union and his union refused to represent him. 670 P.2d at 1136-37.

In this case, Senkow testified that Beard complained to him that his supervisors were harassing him to make his work environment intolerable. Senkow told Beard that he could not pursue the grievance because the actions Beard complained of fell under management's prerogative under Article 5 of the CBA. Under the CBA grievance procedures, Beard could not pursue his grievance past the initial steps without the cooperation of an APEA representative.[4] Like Casey, Beard could not comply with the grievance procedures established by the CBA because his union representative refused to represent him. Any such attempt would have been futile. Under these circumstances, we hold that Beard is excused from exhausting his remedies under the CBA for his claims of constructive discharge and intentional infliction of emotional distress.

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[4] Step one of the grievance procedures set forth in Article 10 of the CBA provides that an employee may submit his grievance to his immediate supervisor. The employee also may take his grievance to step two by writing to the division head without the cooperation of APEA. However, the CBA states that "GRIEVANCES AT STEP THREE AND BEYOND MUST BE PROCESSED THROUGH APEA BUSINESS REPRESENTATIVES." (Emphasis in original).

Since the superior court erred in concluding that Beard was not excused from exhausting his contractual remedies as to each of these claims, we must reverse the superior court's decision striking the claims unless they are not legally viable. *See* Alaska R.Civ.P. 12(b), (f). Beard's claim for constructive discharge is legally viable. Federal courts unanimously have recognized a claim for constructive discharge to prevent employers from avoiding their legal obligations with respect to a formal discharge when they create working conditions so intolerable as to force an employee to resign.[5] We implicitly recognized a cause of action for constructive discharge in *Klondike Industries Corp. v. Gibson*, 741 P.2d 1161, 1166 n. 5 (Alaska 1987). Today, we make explicit that where an employer makes working conditions so intolerable that the employee is forced into an involuntary

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[5] *See, e.g., Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 894, 104 S.Ct. 2803, 2810, 81 L.Ed.2d 732 (1984) (employer violates statute preventing retaliatory discharge for union involvement when "it purposefully creates working conditions so intolerable that the employee has no option but to resign – a so-called "constructive discharge."); *Young v. Southwestern Savings and Loan Ass'n*, 509 F.2d 140, 144 (5th Cir.1975) ("if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee."); *N.L.R.B. v. Holly Bra of California*, 405 F.2d 870, 872 (9th Cir.1969) ("An employer cannot do constructively what the act prohibits his doing directly . . . and causing working conditions to become intolerable as a means of terminating employment is forbidden conduct.").

resignation, the employer is as liable for any illegal conduct involved therein as if it had formally discharged the employee.

In this case, Beard's claim is that by creating conditions so intolerable as to force him to resign, the state violated its duty under Article 5(c) of the CBA to discharge him only for just cause. The state is as liable for violating this duty if Beard was constructively discharged as it would be if it had formally discharged him without just cause. Since Beard has alleged harassment, his constructive discharge claim is legally viable. Therefore, the superior court erred in striking this claim from Beard's complaint.

Beard's intentional infliction of emotional distress claim may be legally viable. We recently reaffirmed our adoption of the *Restatement (Second) of Torts'* elements of intentional infliction of emotional distress: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Oaksmith v. Brusich*, 774 P.2d 191, 200 (Alaska 1989). In light of the difficulty of establishing these elements, we have required that the trial court "make a threshold determination whether the severity of the emotional distress and the conduct of the offending party warrant a claim of intentional infliction of emotional distress." *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454, 456 (Alaska 1985). To be legally viable, Beard's claim must meet this standard, and not the lower standard of Civil Rules 12(b) and 12(f). Since Beard has

presented evidence of harassment and of emotional distress, his claim for intentional infliction of emotional distress may be legally viable. Therefore, the superior court may have erred in dismissing the claim. On remand, the court should evaluate this evidence to determine whether it is sufficient to support Beard's claim. *See King v. Brooks*, 788 P.2d 707, 710-11 (Alaska 1990).

The final claim that the superior court struck from Beard's complaint is denial of due process. Beard alleges that his supervisors' conduct constituting a constructive discharge deprived him of due process of law because he was not given a pre-termination hearing. This claim has no legal basis. Beard's due process claim depends on his having a property right in continued employment. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985). In this case, the just cause requirement in Article 5(c) of the CBA gives Beard a property interest in continued employment. *See* 470 U.S. at 538-39, 105 S.Ct. at 1491-92. Beard's due process rights, however, are only triggered if that interest is deprived, that is, if he is discharged. In this case, the question of discharge is the very subject of dispute. Whether Beard was deprived of his property interest in his job depends on the merits of his constructive discharge claim, that is, whether the appellees engaged in such harassing conduct as to constitute a constructive discharge. Beard does not have a due process right to a hearing to determine whether his due process rights themselves are triggered.[6] To require such a hearing

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[6] Both the timing of and the question to be decided at such a hearing defy sensible description. Beard's argument implies

effectively would decide the question of constructive discharge in Beard's favor. The state is entitled to judgment on Beard's due process claim as a matter of law. Therefore, the superior court properly dismissed the claim.

III. Violation of 42 U.S.C. § 1983

Beard alleges that his supervisors in their individual capacities violated section 1983 by depriving him of his right to freedom of speech under the first amendment of the United States Constitution.[7] Specifically, Beard maintains that he was constructively discharged because he

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that whenever a state employee is considering resignation, he is entitled to a hearing on the question whether he is being harassed and if so whether there is just cause for the harassment.

[7] Beard's claim against his supervisors for violation of section 1983 because they deprived him of his right to freedom of speech under Article I, section 5 of the Alaska Constitution is meritless. Section 1983 creates a cause of action for deprivation of rights guaranteed by *federal* constitutional and statutory law. *Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980). Deprivation of rights guaranteed by state law are not actionable under section 1983. *Williams v. Treen*, 671 F.2d 892, 900 (5th Cir.1982), *cert. denied*, 459 U.S. 1126, 103 S.Ct. 762, 74 L.Ed.2d 977 (1983).

Beard also alleged that the state and the individual appellees in their official capacities violated section 1983 on the same ground. The superior court granted the state's motion for summary judgment on this claim on the basis of our ruling in *Vest v. Schafer*, 757 P.2d 588 (Alaska 1988) that a state is not a person within the meaning of section 1983. Beard's argument for error notes only that the issue is presently before the United States Supreme Court. The Supreme Court has agreed with this court that states and state officials sued in their official capacities are not "persons" under section 1983. *Will v. Michigan*

spoke out on alleged fraud and embezzlement and a cover-up at a state agency, matters of public concern. The superior court granted the state's summary judgment motion on this claim on two alternative grounds. First, the court held that the individual appellees were shielded from liability under their qualified immunity as public officials. Second, even if they were not immune, the court held that they did not violate Beard's rights because Beard's speech was not constitutionally protected.

Whether public officials may assert a qualified immunity defense in a section 1983 action depends on whether they should have known that their conduct violated a person's statutory or constitutional rights:

> [O]fficials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Whether an official may prevail in his qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law."

Davis v. Scherer, 468 U.S. 183, 191, 104 S.Ct. 3012, 3017, 82 L.Ed.2d 139 (1984) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)).

Alaska law on the issue of termination of public employees for the exercise of their first amendment rights is clearly established. *See Wickwire v. State*, 725 P.2d 695 (Alaska 1986); *State v. Haley*, 687 P.2d 305 (Alaska 1984);

Dep't of State Police, ___ U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Beard concedes the point in his reply brief.

City and Borough of Sitka v. Swanner, 649 P.2d 940 (Alaska 1981). As we explained in Wickwire:

> A three-pronged showing is required to establish that [an employee's] discharge violated his free speech right: 1) that he engaged in protected activity; 2) that this activity was a "substantial" or "motivating" factor in the decision to fire him; and 3) that the state has failed to demonstrate that he would have been fired even if the protected speech had not occurred.

725 P.2d at 700 (citing *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977)). In determining what constitutes protected speech, we apply the balancing test adopted by the *Supreme Court in Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968):

> [A] government employer [may] limit the First Amendment rights of an employee only if it can demonstrate that its legitimate interest in promoting efficiency in its operation outweighs the interests of the employee in commenting upon matters of public concern.

Wickwire, 725 P.2d at 700. We "construe the 'public concern' criteria broadly to encompass speech on a wide range of subjects." *Id.* Whether speech is protected under the Pickering balancing test is a question of law.[8]

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[8] 725 P.2d at 700 n. 5. The state argues that none of this analysis is applicable since Beard was not fired. This argument is unpersuasive since an employee who is constructively discharged cannot have fewer rights than an employee who is formally discharged. *See supra* p. 1350. What is true is that

The superior court ruled that Beard's supervisors were protected by their qualified immunity from Beard's claim that they deprived him of his first amendment rights. However, the court did not base this conclusion on the premise that the law in this area was unclear. Rather, the court simply decided the issue on the merits by judging that the supervisors' conduct was objectively reasonable. This is not a proper basis on which to rule that the supervisors are protected by their qualified immunity. This case is not analogous to *Walt v. State*, 751 P.2d 1345 (Alaska 1988) where we affirmed the superior court's ruling that a public officer had qualified immunity from Walt's claim of denial of due process when the legal basis of the claim, the Supreme Court's *Loudermill* decision, had not been decided at the time of termination. 751 P.2d at 1349.

The issue then is only whether the superior court erred in granting summary judgment on Beard's claim on the ground that Beard's speech was not protected. In concluding that Beard's speech was not protected, the superior court did not even reach the *Pickering* balancing test because it decided that "Beard's statements do not address a legitimate issue of public concern." The court reasoned that since the state already had investigated Beard's allegations of corruption at DOT, there was no remaining issue of public concern.

Beard's section 1983 claim against the individual appellees for violating his constitutional rights is dependent on the resolution of his constructive discharge claim. However, this does not justify the superior court disposing of Beard's claim on summary judgment.

The superior court's holding ignores Beard's persistent allegation that the internal review of Beard's claims was a whitewash. This is not simply a matter of personal concern. An allegation of corruption at a state agency raises an important issue of public concern. Both this court and the Supreme Court have found speech to address issues of public concern on substantially less serious issues.[9] This case is not analogous to *Wickwire* where we held that an assistant attorney general's comments regarding internal office matters that did not involve a possible breach of public trust did not rise to the level of a public concern. 725 P.2d at 702-03. Beard's comments raise the issue of a serious breach of public trust that clearly rises to the level of a public concern.

Whether Beard's speech is protected depends on whether the state's interest in maintaining an efficient workplace outweighs Beard's interest as a citizen in speaking out on alleged public corruption. *See Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734. The state notes that there is evidence in the record that after the internal review, Beard continued to discuss his accusations at work and was disruptive. Beard was told to keep his accusations to himself in the workplace absent any new evidence or face disciplinary action. Even if true, this evidence is only relevant to establishing the state's interest in maintaining

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[9] *See Connick v. Myers*, 461 U.S. 138, 149, 103 S.Ct. 1684, 1691, 75 L.Ed.2d 708 (1983) (official pressure on employees to work for political candidates held to be issue of public concern); *State v. Haley*, 687 P.2d 305, 314 n. 6 (Alaska 1984) (presence of international corporations in Alaska held to be issue of public concern); *Swanner*, 649 P.2d at 944 (quality of police service held to be issue of public concern).

an efficient workplace if the disruption was caused by the speech for which Beard alleges he was constructively discharged. Beard claims that his discharge was motivated at least in part by his supervisors' desire to retaliate for his statements to the press and other public officials. The state has presented no specific evidence that this speech disrupted the workplace. With respect to these statements, Beard's interest in exposing alleged public corruption outweighs any general state interest in maintaining an efficient workplace. Therefore, this speech is protected. Since at least some of Beard's speech is protected, the superior court erred in granting the state summary judgment on Beard's claim that his supervisors deprived him of his first amendment rights by constructively discharging him.

IV. Defamation

The first amendment's protection of free and open debate on public issues limits the ability of public officials to recover damages for defamation. *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). To recover damages for defamation, a public official must prove that the statement was published with actual malice. 376 U.S. at 279-80. The protection of the actual malice standard also extends to public figures. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163-65, 87 S.Ct. 1975, 1995-97, 18 L.Ed.2d 1094 (1967). A person may be a public figure for all purposes or only for purposes of a particular set of issues:

> [The public figure] designation may rest on either of two alternative bases. In some

> instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Gertz v. Welch, 418 U.S. 323, 351, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974).

Beard alleges that McMullen defamed him by his statements published in an October 6, 1985 article in the *Fairbanks News-Miner*. Beard objects to the following statements: Beard's rating of low acceptable "accurately reflects his value to the department;" "Beard won't let go of this thing;" "[h]e's become obsessed by it;" "the allegations were primarily a bunch of smoke;" and "Beard's refusal to let the issue die is disrupting work in the right-of-way section." The superior court granted summary judgment on the ground that Beard was a public figure and that he failed to introduce any evidence that McMullen made the statements with actual malice. We agree.

Beard is clearly a public figure with respect to his allegations of corruption at DOT since he brought the issue to public attention by going to the press. Nonetheless, Beard argues that he is not a public figure with respect to the issue of his job performance. In *Rybachek v. Sutton*, 761 P.2d 1013 (Alaska 1988), we were careful in holding that a columnist on mining and natural resource issues was a public figure only "within the limited range

of issues concerning natural resources and mining in Alaska." 761 P.2d at 1014. The state counters that Beard voluntarily injected himself into a public controversy concerning his job performance since he told the News-Miner that as a result of his allegations of corruption his supervisors gave him poor evaluations to force him out. Because Beard linked his job performance to the issue of corruption at DOT, Beard is a public figure with respect to both issues. Therefore, the superior court was correct in ruling that Beard was a public figure for all issues addressed in McMullen's statements.

The remaining issue is whether the superior court was correct in granting summary judgment on the issue of actual malice. To establish actual malice, a public figure must prove by clear and convincing evidence that the defendant acted with knowledge that the alleged defamatory statement was false or in reckless disregard of the statement's truth or falsity. *New York Times*, 376 U.S. at 279-80, 285-86, 84 S.Ct. at 725-26, 728-29. The actual malice standard is a subjective standard requiring "that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968). Summary judgment is appropriate if there is no evidence that the defendant entertained such doubts. *Moffatt v. Brown*, 751 P.2d 939, 944 (Alaska 1988). Beard has introduced no evidence indicating that McMullen entertained any serious doubts as to the truth of his statements. In fact, given the results of the internal review, McMullen had good reason to believe the truth of his statements. Given McMullen's meetings with Beard where Beard told him that he would continue to pursue his allegations, it would

not be unreasonable to believe that Beard was "obsessed" with the issue and "wouldn't let it die." Finally, Beard produced no evidence indicating that the July 22, 1985 evaluation of his most recent performance at the time the article was published was inaccurate. Therefore, the superior court correctly granted summary judgment to McMullen on Beard's defamation claims.

In light of our disposition of this case, it is unnecessary for us to consider the court's award of attorney's fees to the state. The superior court's judgment is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,

Plaintiff,

vs.

DAN BAUM, HAROLD A. CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN C. SISK, and CAROLINE C. VENUSTI, individually and as employees of the STATE OF ALASKA; and THE STATE OF ALASKA,

Defendants.

Cause No. 4FA-87-369 Civil

VOLUME XI

April 11, 1994 – Pages 1772 through 1895

TRANSCRIPT OF EVIDENTIARY HEARING

BEFORE THE HONORABLE JAY HODGES
Superior Court Judge

Fairbanks, Alaska
April 11, 1994
9:00 o'clock a.m.

APPEARANCES:

FOR THE PLAINTIFF:
THOMAS R. WICKWIRE
Attorney at Law
3730 University Avenue South
Fairbanks, Alaska 99709

FOR THE DEFENDANTS:
RANDY M. OLSEN
Office of the Attorney General
100 Cushman Street, Suite 400
Fairbanks, Alaska 99701

* * *

[p. 1892] letter. There wasn't – there were complaints all throughout that, oh, they're out to get me, or boy, this is really tough, or this or that; but nowhere did he say that the working environment was so intolerable and that his union was tipped off that in fact there was a constructive discharge, he was being forced off. For the several months before he retired, his contacts with the union had diminished because they had resolved everything in his favor and he had a work assignment that he had been pushing for and things were happy. Anyway, that's what he's being criticized for in this argument is that for not going to the union for the period before he retired as well as the 30 days following his resignation saying, It's the last straw. I can't take it any longer. I'm being forced out. It's intolerable. He never went to them, never gave them a chance to file the grievance that he's complaining he should be excused for.

I would submit to the Court that there is not the showing that is required by *Casey* that the employee ask the union to file a grievance and the grievance has been

refused in this case. And if he had gone to them, their testimony is we would have filed that if he had asked us. There is no futility. In fact, and Beard has never claimed that he thought it was futile also. Thank you, Your Honor.

COURT'S RULES AND FINDINGS

THE COURT: The Court makes the following rule with respect to the issue concerning the exhaustion of administrative [p. 1893] remedies. In this case it's clear from the evidence that was produced at trial that over a substantially long period of time through a concerted, concentrated effort, the management at the DOT set out to get rid of Mr. Beard. It's clear that during this process, there were a number of battles that were fought and many of which were won by Mr. Beard. It's clear that the war itself was not being won, it was a war of attrition to force Mr. Beard out of DOT.

It is clear and should have been clear to the union and the union representative that this was an ongoing situation, that the situation was not correcting itself, and in fact up until the time that Mr. Beard left, it had not corrected itself.

The fact that Mr. Beard did not use magic words concerning being forced to resign, constructive discharge, is not critical to the Court's ruling.

The Court finds that the union did not in fact present a grievance to take into account overall context of what was occurring. It's sufficiently clear to the Court that in Mr. Beard's contact with the union, it should have been clear to the union what Mr. Beard wanted. And that was

basically to stop the harassment and prevent him an acceptable work place.

As even the testimony of Mr. Senkow indicates, he was fighting the individual battles one at a time and doing well and winning the battles. But they lost sight of the fact that the war was not being waged. Mr. Senkow's affidavit, the original [p. 1894] affidavit is pretty clear in the sense that we are not going to arbitrate or grieve the overall situation because it's not grievable. His subsequent testimony is in a different light, in a different context. At the time these events were occurring, it's clear that with respect to many of the – it's the overall course of conduct we're dealing with, not a specific event, that there was a factual inaccuracy in evaluation. The fact that he was being shunned by the people at DOT, the fact that he was being assigned this and that, although not grievable, certainly was part of the overall factual situation that led to his ultimate termination.

The Court specifically finds that it should have been sufficiently clear to the union that Mr. Beard wanted to correct his intolerable situation at DOT. They did not proceed to represent him in connection with that.

Furthermore, even if a grievance had been filed on that based on what had occurred in connection with the factual information that occurred at trial as well as the jury verdict, any grievance concerning his work situation, any grievance concerning his termination would have been entirely futile. Even if he had won the grievance and gone back to work, the situation still would not have been corrected. He might have won the grievance, but he would not have won the war.

The Court finds, number one, that the union was certainly put on notice and was put on notice of what the intolerable [p. 1895] situation of Mr. Beard was with respect to the work. That the union did not grieve that aspect of the situation. And number two, even if there was – he failed to present sufficient information to the union so that they were on notice of what he wanted them to do, it would have been futile to grieve that aspect and it's therefore excused. Therefore, the issue concerning failure of exhaustion of administrative remedies is ruled on in favor of the plaintiff. Anything else?

MR. WICKWIRE: None I can think of, Your Honor.

MR. OLSEN: Nothing right now, Your Honor.

THE COURT: You can be excused.

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(Court recessed)

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END OF REQUESTED PORTION

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CERTIFICATE

SUPERIOR COURT)
) ss.
STATE OF ALASKA)

I, Sharon I. Rutland, court reporter for the Fourth Judicial District, State of Alaska, hereby certify:

That the foregoing pages numbered 1772 through 1895 contain a full, true, and correct transcript of proceedings in Cause No. 4FA-87-369, Beard vs. McMullen, Fourth Judicial District, transcribed by me to the best of my knowledge and ability from Fourth Judicial District GYYR tapes identified as follows:

Tape No. 4FAB-3081, Log Nos. 1705-4175
Tape No. 4FAB-3082, Log Nos. 0000-4108
Tape No. 4FAB-3083, Log Nos. 0000-2377

DATED at Fairbanks, Alaska, this 18th day of April, 1994.

SIGNED AND CERTIFIED TO BY:

/s/ Sharon I. Rutland
Sharon I. Rutland
Court Reporter
My Commission Expires 2-23-98

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,)
Plaintiff(s),)
v.)
DAN BAUM, et al.,)
Defendant(s).)

No. 4FA-87-369 Civil

SPECIAL VERDICT

We the Jury in the above-entitled case find by agreement of ten (10) or more of our members, the following on questions submitted to us.

Q. 1. Did Mr. Beard's supervisors and other Department of Transportation employees acting together or separately make Mr. Beard's job intolerable?

Yes (answer yes or no)

Q. 2. Did Mr. Beard resign because his job had become intolerable by reason of the acts of his supervisors and other employees?

Yes (answer yes or no)

If your answer is "yes" to both question 1 and 2, answer question 3. If your answer is "no" to either question 1 or 2, skip question 3 and go to question 4.

Q. 3. After subtracting any sums which should be deducted according to the instructions I gave you, what is the total amount of earnings and benefits lost by Mr. Beard as a result of the breach of his contract?

$696,571.00

Q. 4. Did any of the individual defendant [sic] intentionally inflict emotional distress on Mr. Beard?

Yes (answer yes or no)

If your answer to question 4 is yes, answer question 5. If your answer to question 4 is "no" skip question 5 and go to question 6.

Q. 5. What amount of money will fairly compensate Mr. Beard for intentional infliction of emotional harm by each of the following defendants. (It need not, but may, be all of them.)

William McMullen	$1000.00
Harold Cameron	$1000.00
Sharon McLeod	$ 0
Daniel Baum	$ 0
Caroline Venusti	$1000.00

Q. 6. Did any of the individual defendants, while exercising the power or authority of their office, retaliate against Mr. Beard by causing harm to him for reporting or speaking out on possible wrongdoing by his coworkers or supervisors as set forth in Instructions 24, 25?

Yes (answer yes or no)

If your answer to question 6 is "yes" answer question 7. If your answer to question 6 is "no" skip question 7 and go to question 8.

Q. 7. What amount of money will fairly compensate Mr. Beard, for retaliation against him for speaking out on free speech issues, by the following individual defendants? (It need not, but may be all of them.)

William McMullen	$ *0*
Harold Cameron	$ *0*
Sharon McLeod	$ *0*
Daniel Baum	$ *0*
Caroline Venusti	$ *0*

(No amount of money could fairly compensate Mr. Beard for loosing his freedom of speech.)

Q. 8. Do you find that either one or more of the individual defendants' actions was the type of wrongdoing as to warrant an award of money damages solely to punish them?

Yes (answer yes or no)

If so, what amounts for each individual defendant?

William McMullen	$*70,000.00*
Harold Cameron	$*45,000.00*
Sharon McLeod	$ *1,000.00*
Daniel Baum	$ *0*
Caroline Venusti	$*45,000.00*

DATED at Fairbanks, Alaska this 29th day of July, 1991.

/s/ Reneé Moore
FOREPERSON

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,	)
Plaintiff,	)
v.	)
DAN BAUM, HAROLD A. CAMERSON [sic], SHARON MCLEOD, WILLIAM B. MCMULLEN, STEPHEN C. SISK and CAROLINE C. VENUSTI individually and as employees of the STATE OF ALASKA; and the STATE OF ALASKA,	)
Defendants.	)

Case No. 4FA-87-369 CIV.

AMENDED COMPLAINT

(Filed Oct. 26, 1987)

Plaintiff Burle B. Beard, by and through undersigned counsel, hereby complains and alleges as follows:

1. Plaintiff Beard at all times relevant to this action has been domiciled in Fairbanks, Alaska.

2. Defendants Dan Baum, Harold A. Cameron, Sharon McLeod, William B. McMullen, Stephen C. Sisk and Caroline C. Venusti at all times relevant to this action have been domiciled in Fairbanks, Alaska, and employed by the defendant State of Alaska; and have committed all

relevant acts and transactions in Fairbanks, except perhaps the extent of publication, which is not presently known.

3. This court has jurisdiction of this action under AS 09.05.015(a), AS 09.50.250 and AS 22.10.020(a).

4. Beard was an employee of the State from 1966 until 1986 and had achieved permanent status.

5. Beard consistently received favorable performance evaluations and avoided discipline until 1985, when he exposed fraud and embezzlement within his department, including personal use of State time and equipment, falsification of time records and employment applications and irregularities in employee promotions and evaluations.

6. On October 1985, following Beard's revelations, defendant McMullen made the following statements, false, unprivileged and defamatory per se, to a reporter for the Fairbanks Daily News-Miner, which statements the newspaper, which has a general circulation estimated at 19,000, subsequently published:

a. that Beard's work was in the low range of acceptable, which accurately reflects his value to the department;

b. that Beard is obsessed;

c. that Beard's allegations were "a bunch of smoke"; and

d. that Beard's refusal to follow instructions was disrupting work.

7. Also after Beard's revelation, defendants singled him out for quarterly instead of annual reviews and gave him unsubstantiated unfavorable ratings.

8. Defendants also suspended Beard and threatened further discipline, including termination, if he continued to expose his charges.

9. Defendants also substantially reduced Beard's workload and denied him promotions, negotiation assignments and training despite his superior qualifications.

10. Defendants also ostrasized [sic] Beard; they increasingly scrutinized trivial aspects of his performance, such as unexplained absences even for legitimate reasons; and they falsely accused him of stealing a typewriter while he was suspended, away from the office and had no key.

11. Defendants' actions have been malicious and in reckless disregard of Beard's rights, and they occurred with the conscious intention and expectation that they would discredit Beard's reputation, credibility, respect, good will, trust and confidence generally and with his superiors specifically, creating either a false record of poor work performance on which to fire Beard or an intolerable working environment so that he would quit, thereby protecting the individual defendants' own economic interests.

12. As a result of defendants' actions, Beard has suffered embarrassment, humiliation, severe emotional and mental distress, physical injury and damage to his personal and professional reputation, and he terminated his employment with the State on August 22, 1986.

COUNT I – Intentional and/or Negligent Misrepresentation

13. Beard realleges and incorporates paragraphs 1 through 12 as if set forth fully.

14. Defendants' actions constitute intentional and/or negligent misrepresentation.

COUNT II – Defamation

15. Beard realleges and incorporates paragraphs 1 through 14 as if set forth fully.

16. Defendants' actions constitute defamation.

COUNT III – Intentional Infliction of Emotional Distress

17. Beard realleges and incorporates paragraphs 1 through 16 as if set forth fully.

18. Defendants' actions constitute intentional infliction of emotional distress.

COUNT IV – Breach of Implied Covenant of Good Faith and Fair Dealing

19. Beard realleges and incorporates paragraphs 1 through 18 as if set forth fully.

20. Defendants' actions constitute a breach of the State's implied covenant of good faith and fair dealing.

COUNT V – Wrongful Constructive Termination

21. Beard realleges and incorporates paragraphs 1 through 20 as if set forth fully.

22. Defendants' actions constitute wrongful constructive termination.

COUNT VI – Denial of Due Process of Law

23. Beard realleges and incorporates paragraphs 1 through 22 as if set forth fully.

24. Defendants' actions have deprived Beard of the due process of law guaranteed by the U.S. Constitution, Amen. XIV, section 1, and the Alaska Constitution, Art. I, section 7.

COUNT VII – Denial of Equal Protection of the Laws

25. Beard realleges and incorporates paragraphs 1 through 24 as if set forth fully.

26. Defendants' actions have deprived Beard of the equal protection of the laws guaranteed by the U.S. Constitution, Amend. XIV, section 1, and the Alaska Constitution, Art. I, section 1.

COUNT VIII – Denial of Freedom of Speech

27. Beard realleges and incorporates paragraphs 1 through 26 as if set forth fully.

28. Defendants' actions have deprived Beard of the freedom of speech guaranteed by the U.S. Constitution, Amend. I, and the Alaska Constitution, Art. I, section 5.

COUNT IX – 42 U.S.C. Section 1983

29. Beard realleges and incorporates paragraphs 1 through 28 as if set forth fully.

30. Defendants' federal constitutional rights entitled Beard to recovery under 42 U.S.C. section 1983.

WHEREFORE, Beard seeks

1. a compensatory award for the general and special damages set forth above in an amount to be proven at trial exceeding $35,000;

2. punitive damages in an amount to be proven at trial exceeding $35,000;

3. costs and attorneys' fees under AS 09.60.010, Alaska R. Civ. P. 54, 79 and 82 and 42 U.S.C. section 1988; prejudgment and postjudgment interest under AS 45.45.010(a) and AS 09.30.070; and other relief.

JURY DEMAND

Plaintiff demands jury trial for all issues so triable.

DATED: July 30, 1987

/s/ Thomas R. Wickwire
Thomas R. Wickwire
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30 day of July, 1987, a true and correct copy of the foregoing was served by mail on

/s/ R. Olsen
/s/ C. Murray

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

Burle B. Beard,	)	
Plaintiff,	)	
v.	)	(Filed
Dan Baum, et al.,	)	June 24, 1991)
Defendants.	)	

Case No. 4FA-87-369 Civil

PLAINTIFF'S PRETRIAL MEMORANDUM

TRIAL BRIEF

A. **CONTESTED FACTS**

CONSTRUCTIVE TERMINATION & BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

1. Did Mr. Beard report acts of criminal activity or public corruption being done by his supervisors and co-workers and being condoned by his superiors?

2. Did his supervisors and other co-worker Defendants retaliate against him for his reporting their wrongdoing, even if the facts he reported were not complete as no investigation had been done?

Beard claims the retaliation took several forms:

- False or slanted hyper-critical job evaluations.

- Frequent job evaluations

- Withholding any satisfying, challenging work.

– Making him work below his abilities.

– Co-workers giving him the "cold shoulder".

– Spying on him both on and off the job.

– Accusing him of stealing.

– Harsh criticism and discipline for minor infractions, while not disciplining his superiors at all for major infractions.

– Falsely accusing him of "disrupting" the work of others and encouraging co-workers to accuse him of disrupting because that destroys his Constitutional protection from being disciplined for reporting wrongdoing as possible public corruption.

– Requiring him to keep time records of his work hour by hour and submit weekly reports for several months when there was no indication that he was not getting his work done.

– Requiring him to get a doctor's note to prove sick leave when he had no record of abusing sick leave in 18 years, then using this "feedback" information as confirming that the harassment was working.

3. Did the individual Defendants create a work environment of hostility, distrust criticism and lacking in any job satisfaction which caused Beard's job and work environment to become intolerable to the normal employee? If so, was Beard an employee of normal sensibilities, i.e., not hyper-sensitive?

If 1, 2 and 3 are true and Beard resigned because of them, then he was constructively terminated in breach of the employment contract.

If his supervisors did these things without justification, but their effect fell short of forcing him to resign, then they breached the "Covenant of Good Faith and Fair Dealing".

4. If, in addition to the above acts, Beard also proves they were done intending to hurt him, to fire him without cause or to force him to quit, then the same acts make out intentional infliction of emotional distress.

42 U.S.C. Sec 1983

5. If Beard also proves that the individual Defendants, together or acting separately, forced him out of his job without having the just cause grounds to fire him and in retaliation for speaking out on a public interest issue, then they will have taken away his First Amendment right of Free Speech and his property interest in his job without due process and are liable for Beard's 42 U.S.C. Sec 1983 claim.

6. Among the contested facts are also whether, and to what extent the individual Defendants' conduct fits the "beyond the bounds of decency" standard to justify punitive damages.

B. CONTESTED LAW

1. An issue of law which has not been raised is whether the level of intentionally wrongful conduct required for the intentional infliction of Emotional Distress (IIED) claim is the same as that required to award punitive damages, on State claims or on the Federal Section 1983 claims. This will only become important in jury

instructions. As briefed below, Plaintiff believes the standard is slightly higher for an IIED claim than for punitive damages on other types of claims.

2. Whether Beard's $13,000.00 settlement of his Workers' Compensation claim for job stress is an offset to any of these claims. This has been briefed and is the subject of a pending motion.

3. Whether the Defendants should be precluded from mentioning the other government agencies that Beard notified of the same employee wrongdoing and who failed to take any action after varying levels of investigation. This has been briefed and is the subject of a pending motion of May 27, 1988, which was evidently mooted by the prior appealed dismissal, but is now reinstated. Plaintiff requests a ruling on this motion.

4. Whether the burden of proof shifts to the employer State to show its criticisms and other constructive discharge acts were justified once Beard shows he was performing his job duties, i.e., that his poor performance evalatuions were rescinded after grievance as unfounded. *Skagway City School Board v. Davis,* 543 P.2d 218 (Alaska 1975); *Arco Alaska v. Akers,* (Alaska 1988).

C. FACTS OF THE CASE

Beard believes a restatement of the facts here is unnecessary given the multiple motions and Supreme Court decision where they are stated.

D. LEGAL BRIEF

PROOF NEEDED FOR IIED AND PUNITIVE DAMAGES

1. In *Oaksmith v. Brusich*, 774 P.2d 191 (Alaska 1989), our court followed *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454, 456 (Alaska 1985), which adopted the Restatement (2d) of Torts elements of an IIED claim. That definition states that the "extreme and outrageous" standard for IIED is more than the minimum required to support punitive damages for another tort. Thus, it seems clear that the standards are different and the IIED standard of proof is higher although difficult to measure or describe. Although the proof here overlaps, the distinction needs to be maintained here.

Since the proof of wrongful conduct is weaker for punitive damages than to prove the IIED cause of action, the jury should be told this in order to avoid a possible inconsistent verdict should the jury rely on the same evidence to award no punitive damages, but to find the IIED proven.

It should also be made clear to the jury that proof of the Section 1983 claim does not require specific intentional wrongdoing, just (1) denial of a Federal Constitutional right and (2), by one or more defendants acting under color of State law or authority. The jury then may also award punitive damages on this claim if it also finds the individual defendants' conduct was malicious, hostile or with reckless indifference toward Beard's interests, rights or safety. AK P. Civ. J.I. 20.20.

As 09.17.020 requires the conduct on which a punitive award is based to be supported by clear and convincing evidence.

WORKERS COMPENSATION SETTLEMENT NOT AN OFFSET

2. Whether Beard's $13,000.00 Workers' Compensation settlement is an offset to his damages in these claims has been briefed in a pending motion. Since that claim was settled without a hearing, there are no findings which could be *res judicata*.

FINDINGS (IMPLIED) FROM OTHER AGENCIES

3. This issue – whether Defendants should be precluded from mentioning the inaction by other State and Federal agencies to whom Beard reported the same wrongdoing is the subject of a motion filed May 27, 1988 which was mooted during the appeal. A ruling on this is needed.

4. The burden of proof shifts to the employer State to show justification for its actions leading to Beard's leaving the job once Beard shows he performed his job acceptably. This is the holding of *Skagway City School Board v. Davis*, 543 P.2d 218 (Alaska 1975). Plaintiff asks for a jury instruction on this.

5. 42 U.S.C. Section 1983

1. GENERAL PARAMETERS OF A CAUSE OF ACTION BROUGHT PURSUANT TO 42 U.S.C.A. SECTION 1983.

Plaintiff's Civil rights cause of action is premised upon 42 U.S.C. Sec. 1983, which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

The Supreme Court. In describing Section 1983 Civil Remedies has spoken as follows:

> Both *Baker v. McCollan* and *Monroe v. Pape* suggest that Section 1983 affords a "civil remedy" for deprivation of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any Section 1983 action, the initial inquiry must focus on whether the two essential elements to a section 1983 action are present: (1) Whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived the person of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 537, 101 S.Ct. 1908, 1913.

From the outset, it is clear that alleged violations which give rise to section 1983 causes of action require conduct by a "person, under "color of law" which causes a violation of rights guaranteed by the Constitution of the United States. Those guaranteed rights are ones that have held applicable to the states thru [sic] incorporation by the Fourteenth Amendment. The rights of freedom of

speech, accorded by the First Amendment to the Constitution, has been held as applying to the states through the Fourteenth Amendment since *Fisk v. Kansas*, 274 U.S. 380, which has been followed by many cases including those cited by our court in the appeal decision in this case.

Noteworthy, in a historical sense, is that until *McNeese v. Bd. of Education*, 373 U.S. 688 (1963), federal courts had taken the position that deprivation of property rights (without adequate due process) were *not* actionable under 42 U.S.C.A. Sec. 1983 due to a failure in jurisdictional legislation. Since then, however, it is clear that Section 1983 may provide a vehicle for both substantive rights violations and procedural due process violations giving rise to property loss. They are distinct issues.

Beard's *Amended Complaint* alleged that Defendants' acts alleged in paragraph 1 – 28 violated his Federal Constitutional rights so he is entitled to recover under 42 U.S.C. Sec. 1983. (Amended Complaint paras. 29, 30)

Beard's Supreme Court Brief contended that his due process rights had been violated in two ways: by being constructively discharged without a pre-termination hearing and without due process (Beard Brief at 34, copy attached.) When the Supreme Court ruled that Beard cannot have a due process claim for being terminated without a hearing when constructive termination was in issue and as yet undecided, it did not decide whether the State had just cause to fire him. If it did not, his other due process claim is that his job was taken without proof of grounds to terminate him. The proof must be shown by

evidence of a just cause ground. If the defendants subjected him to the harassment tactics that resulted in constructive termination, then the state breached his employment contract and the individual defendants took his property interest in his job. This claim against them should proceed on its proof just as the claim that they retaliated against him for speaking out on a public interest issue.

B. Objections to Documents & Exhibits

Plaintiff received by fax, a list of Defendants' exhibits, but not copies of them on June 17, 1991. The list is not specific enough to identify all documents on it. Plaintiff objects to the following until a copy is acquired and reviewed for objections:

F.	Savage letter of July 19, 1985	
U.	"Grievance Resolution"	– There were several; which one?
AA.	Beard 1985 Journal)	– Parts of these are privileged, irrelevant, private as referring to personal matters or non-parties. This briefed in Opposition to Defendants' Motion to Compel Production of these journals of 9/23/88, which is pending decision.
BB.	Beard 1986 Journal)	
CC.	Beard 1987 Journal)	

AD. Beard handwritten notes, 1985 (108 pages)	)	– Cannot determine if objectionable in part until copies are received.
AE. Beard handwritten notes, 1986 (74 pages)	)	
AF. Beard Apr. 9, 1986 ACLU letter	)	– Inadmissible per May 27, 1988 motion, pending ruling on Evid. R. 803(8)(b); Irrelevant
AG. Beard July 17, 1986 ACLU letter	)	

C. **STIPULATIONS**

None known from Defendants which are not contested by them.

D. **DEPOSITION**

Plaintiff will offer the video deposition of Dr. Eugene Silberberg and of Dr. James R. Simmons in total. There were no transcripts of these prepared. Each lasts approximately one hour.

DATED: 24 June, 1991

/s/ Thomas R. Wickwire
Thomas R. Wickwire
Attorney for Plaintiff

IN THE SUPREME COURT FOR
THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,	)
Appellant,	)
v.	)
DAN BAUM, HAROLD A. CAMERON, SHARON McLEOD, WILLIAM B. MCMULLEN, STEPHEN C. SISK, and CAROLINE C. VENUSTI individually and as employees of the STATE OF ALASKA; and THE STATE OF ALASKA,	)
Appellees.	)

Supreme Court Case No. S-3229

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA,
FOURTH JUDICIAL DISTRICT
JAY HODGES, JUDGE

BRIEF OF APPELLANT

LAW OFFICE OF
THOMAS R. WICKWIRE
3700 University Avenue South
Fairbanks, Alaska 99709

Attorney for Appellant

/s/ Thomas R. Wickwire
THOMAS R. WICKWIRE

FILED in the Supreme Court
of the State of Alaska,
this 24th day of May, 1989

CLERK OF THE COURT

By: /s/ Teresa High
DEPUTY CLERK

* * *

summary judgment except with respect to intentional infliction of emotional distress, wrongful constructive termination and denial of due process, where the court denied leave to amend the complaint, R. 179; the court previously had dismissed the emotional distress claim against McMullen. R. 27. To conclude that Beard's speech was not protected, the court made a finding that "his actions were disruptive to his working relationship with fellow employees. . . . Beard's statements do not address a legitimate issue of public concern. R. 578-579. The State thoroughly investigated Beard's allegations." R. 579. The court granted the State its costs of $6,815.33 and $30,000 of its attorneys' fees and entered final judgment on January 25, 1989, from which Beard has filed this timely appeal. R. 749. It is relevant to the merits of the appeal that nothing in Beard's wrongful constructive termination claim indicates that it is an action in tort. The former alleges violations of constitutional, statutory and contract rights as distinguished from his intentional infliction of emotional distress tort claim.

ARGUMENT

I. THE SUPERIOR COURT ERRED BY RULING THAT THE COLLECTIVE BARGAINING AGREEMENT PROVIDES BEARD'S EXCLUSIVE REMEDY.

A. Beard's Rights and Remedies

In the absence of any remedies in the Agreement, numerous judicial remedies would exist for the conduct in this case. In *Casey v. Fairbanks,* 670 P.2d 1133, 1138 (Alaska 1983). Persons employed other than "at will" have a sufficient property interest in continuing their employment absent just cause for their removal, to require that they be given notice and an opportunity to be heard under the due process clause of the Alaska Constitution (Art. 1, Sec. 7) before their employment is terminated. *Casey v. Fairbanks,* 670 P.2d 1133, 1138 (Alaska 1983). Numerous decisions have recognized the same right under the U.S. Constitution. *See Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 546 (1985); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 432 (1982); *University of Alaska v. Chauvin,* 521 P.2d 1234, 1238 (Alaska 1974). *Loudermill,* clarified that a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *See* 470 U.S. at 546. The government's interest in terminating the employee does not outweigh the employee's interest in retaining his employment and the value in reaching an accurate decision. *Id.* at 543-44.

Further, what is subject to constitutional protection is not only the employee's property right to a particular position, "but also his or her professional reputation and

the opportunity for employment thereafter." *See Crisp v. Kenai Peninsula Borough School District*, 587 P.2d 1168, 1170 n. 7 (Alaska 1978), *overruled on other grounds, Rosen v. State Board of Public Accountancy*, 689 P.2d 478 (Alaska 1984); see also *Loudermill*, 470 U.S. at 547 n. 13 (rejectinq such a liberty claim only in the absence of publication of the reasons for discharge); *Arnett v. Kennedy*, 416 U.S. 134, 157 (1974) ("that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee.").

In addition, the arbitrary denial of due process without a rational basis, *see Logan*, 455 U.S. at 439 (Blackmun, J., separate opinion), like the discriminatory administration of State procedures, *see Herrick's v. State*, 754 P.2d 1111, 1116 (Alaska 1988) (action against Department of Transportation), may violate an employee's right to equal protection under the Alaska and U.S. Constitutions. *Herrick's* notes that "the minimum burden that the state must meet when defending challenged legislation on equal protection grounds under the Alaska Constitution is greater than that required under the United States Constitution." *See, id.* at 1114. In Alaska, courts examine what weight should be afforded the impaired constitutional interest, the Purposes served by the impairment and the State's interest in the particular means employed. *See Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984). "Depending upon the primacy of the interest involved, the state will greater or lesser burden in justifying its legislation." *Ibid.*

These constitutional provisions themselves may support a cause of action, *see, e.g., Herrick's*, 754 P.2d at

1112-13, possibly for damages, *see Vest v. Schafer*, 757 P.2d 588, 598 and n. 38 (Alaska 1988), *Appeal pending*. Further, even if the constitutional provisions do not provide a damages remedy directly, *Loudermill* demonstrates the availability of relief for constitutional violations under Sec. 1983 and that this relief is available even without an exhaustion of alternative remedies, for Loudermill brought his Sec. 1983 action even though "the commissions decision was subject to judicial review in the state courts," *see* 470 U.S. at 536. The circuit court in *Loudermill* specifically had ruled that there is no state judicial exhaustion requirement in Sec. 1983 cases. *See Loudermill v. Cleveland Board of Education*, 721 F.2d 550, 555 (6th Cir. 1983), *rev'd on other grounds*, 470 U.S. 532 (1985); *see also Patsy v. Board of Regents*, 457 U.S. 496, 502 (1982). Section 1983 plaintiffs may recover punitive as well as general damages. *Bradshaw v. Zoological Society*, 569 F.2d 1066, 1068 (9th Cir. 1978).

In addition, because of the importance of these constitutional guarantees, this court consistently has recognized wrongful discharge actions even without a showing that the employee's union breached its duty *See Kollodge v. State*, 757 P.2d 1028, 1034 (Alaska 1988); *Casey*, 670 P.2d at 1138. "Under federal law the employee may not proceed directly against the employer without first proving a breach of the union's duty of fair representation. Alaska law places no such impediment on an employee's right to obtain direct review of the employer's decision to terminate the employee." *Kollodge*, 757 P.2d at 1034 (citation omitted). The employee's duty to make a good faith effort to exhaust alternative remedies before bringing this action does not require that he take steps which would be

futile. *Reed v. Anchorage*, 741 P.2d 1181, 1186 (Alaska 1987); *Casey*, 670 P.2d at 1136.

Further, in Alaska, "when the State fires an employee for an unconstitutional reason, this amounts to unfair dealing as a matter of law and gives rise to contract remedies." *State v. Haley* 687 P.2d 305, 318 (Alaska 1984). Such remedies also may arise even in the absence of a constitutional violation, for "in every contract . . . there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *See Mitford v. de Lasala*, 666 P.2d 1000, 1006 (Alaska 1983) (citation omitted); *see also Knight v. American Guard & Alert Inc.*, 714 P.2d 788, 792 (Alaska 1986); *Stanfill v. Fairbanks*, 659 P.2d 579, 581 (Alaska 1983).

Finally, it is well established that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to * * *

settled until the pendency of this action.

CONCLUSION

For the reasons stated above, the Superior Court's grant of summary judgment in favor of all defendants was based on erroneous application of the law and on findings in the movant defendants' favor on disputed material facts. Therefore the judgment should be reversed and the case remanded for further proceedings and trial.

DATED: May 23, 1989

/s/ Thomas R. Wickwire
Thomas R. Wickwire
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF ALASKA

CITY OF FAIRBANKS, MICHAEL PULICE and PATRICK B. COLE, Appellants, vs. JIMMY RICE and LEE DESPAIN, Appellees.	)	Supreme Court No. S-8469
LEE DESPAIN, Cross-Appellant, vs. CITY OF FAIRBANKS, MICHAEL PULICE and PATRICK B. COLE, Cross-Appellees.	)	Supreme Court No. S-8470
JIMMY RICE, Appellant, vs. CITY OF FAIRBANKS, MICHAEL PULICE and PATRICK B. COLE, Appellees.	)	Supreme Court No. S-8479

JIMMY RICE, Appellant, vs. CITY OF FAIRBANKS, MICHAEL PULICE and PATRICK B. COLE, Appellees.	)	Supreme Court No. S-8489

Trial Court Case No. 4FA-95-01582 CI

APPEAL FROM JUDGMENTS OF THE
SUPERIOR COURT FOR THE STATE OF ALASKA,
FOURTH JUDICIAL DISTRICT
THE HONORABLE MARY E. GREENE

OPENING BRIEF OF CITY, COLE, AND PULICE

* * *

the Fire Department (Tr. 2329, 2773-74). They continued their surveillance activities (Tr. 2298). A video tape made by Rice and DeSpain showed them conducting surveillance of Pulice in June of 1995 (Exh. C-DY, Tr. 2724, 2851).

Rice and DeSpain claimed the threats by Pulice made their working conditions intolerable, and because Cole failed to act against Pulice, they were forced to resign (Exc. 33, 322). No threat or retaliation was alleged other than the phone call (Tr. 2328, 2770).

II. STATEMENT OF THE COURSE OF PROCEEDINGS BELOW.

Numerous claims were dismissed through pre-trial motions. Issues that survived for trial were constructive

discharge, claims under the Alaska Whistleblower Act (AS 39.90.100 – .150), free speech claims under 42 U.S.C. § 1983, and DeSpain's defamation claim against Pulice (Tr. 4082). Trial began on February 18, 1997 (Tr. 79-80). The jury returned its verdict for Rice and DeSpain on March 28, 1997 (Exc. 295, 825). Defendants moved for JNOV or for a new trial, and the court granted JNOV as to Cole's qualified immunity (Exc. 839, 840). Rice and DeSpain sought attorney's fees (R. 7769, 8186, 8265), as did Cole (Exc. 856, 860).

STANDARD OF REVIEW

The applicable standard of review precedes the discussion of each issue.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, FOR A DIRECTED VERDICT AND FOR JNOV ON THE ISSUE OF CONSTRUCTIVE DISCHARGE.

* * *

136 L.Ed.2d 330 (1996) (claims under the ADA and Title VII were subject to mandatory arbitration under the grievance procedure of a collective bargaining agreement). "Having made the bargain to arbitrate, the parties should be held to it unless Congress itself evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26, 114 L.Ed.2d at 37. Alaska's Whistleblower Act shows no such intention in its text or legislative history. There is no

conflict between arbitration and the statute's purpose. Neither Rice nor DeSpain can show that the legislature intended to preclude arbitration of statutory claims.

An employee must exhaust contractual or administrative remedies before pursuing a direct judicial action. *Romulus v. Anchorage School District*, 910 P.2d 610, 615 (Alaska 1996). Where a collective bargaining agreement allows employees to pursue grievances against the employer when the union will not, exhaustion of the grievance procedure is required before the employee may sue the employer. *Cozzen v. Municipality of Anchorage*, 907 P.2d 473, 477 (Alaska 1995). The collective bargaining agreement ("CBA") between the City and the Association addressed grievance procedures (Exc. 361) and had arbitration as the final step (Exc. 362).

The grievance procedures formed the "exclusive method of resolving grievances arising under [the CBA], not including unfair labor practices or other disputes covered under PERA" (Exc. 367). Arbitration is favored in Alaska and exhaustion of administrative remedies must be pursued before court action. *State v. Beard*, ___ P.2d ___, Op. No. 4996 at 8 (Alaska, May 29, 1998) (*Beard IV*). This policy "promotes judicial efficiency by affording an institution an opportunity to correct its own errors, so as to render judicial action unnecessary." *Id.* at 8-9. This Court held:

> We consequently hold that the unexcused failure to exhaust that bars Beard's claims against the State also bars his claims against McMullen and Venusti. The well-recognized principles favoring exhaustion apply equally to claims against

> supervisors who engaged in the tortious conduct that formed the basis for Beard's State IIED and constructive discharge claims. The judgment against Venusti and McMullen must therefore be set aside.

Id., at 19-20. The strong policy favoring exhaustion of administrative remedies should apply to retaliation under the Whistleblower Act and to claims of constructive discharge. Otherwise, complaints of unfair working conditions or denials of rights under a contract could be couched in a "whistleblower" claim to subvert and bypass arbitration and the grievance procedure.

C. Rice Failed To Exhaust His Administrative Remedies As To His Promotion Claim.

Rice, as Business Agent, grieved the failure to promote him to Battalion Chief (Exc. 333), alleging violations of the CBA and disparate treatment (Exc. 333). City Manager Wolting denied the grievance (Exc. 336). Rice informed Wolting of the Association's intent to arbitrate (Exc. 337-38). The Association later decided not to represent Rice, and Rice pursued the grievance individually (Exc. 339). Pulice, Cole, Rice and others, met to discuss the grievance (Exc. 340). Rice proposed a settlement (Exc. 340). The City agreed to settle if the Association would hold the * * * administrative remedies. Rice failed to exhaust his administrative remedies as to his promotion. This Court should remand for dismissal of that claim.

The court erred in not taking control of Rice and DeSpain and their counsel and in not enforcing the rules of evidence and trial conduct. The prejudice arising from

the evidentiary errors and trial misconduct requires that a new trial be ordered.

This Court should order that judgment be entered in accordance with the judgments lodged by defendants and remand the case to the trial court for recalculation of attorney's fees.

This Court should reverse the trial court's denial of summary judgment and dismiss DeSpain's defamation claim. In the alternative, remittitur should be ordered in the amount of $1.00.

The trial court abused its discretion in its denial of adequate attorney's fees, costs and prejudgment interest on behalf of Cole. This issue should be remanded with instruction for the trial court to accept Cole's methodology and to award fees accordingly.

DATED and RESPECTFULLY SUBMITTED this 16th day of June, 1998, at Fairbanks, Alaska.

OFFICE OF THE CITY ATTORNEY
Attorneys for Defendants

By: /s/ JM Eberhart
John M. Eberhart
Deputy City Attorney
AK Bar No. 8111088

By: /s/ Paul J. Ewers
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Supreme Court, U.S.
FILED
SEP 28 1998
OFFICE OF THE CLERK

(2)

No. 98-351

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BURLE B. BEARD,

Petitioners,

v.

DAN BAUM, HAROLD CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN C. SISK, CAROLINE VENUSTI, and the STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The Alaska Supreme Court

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the petitioner properly raise his federal question--whether his 42 U.S.C. § 1983 claim may be subject to a defense of failure to exhaust administrative procedures--in the state court?

2. Does the Alaska Supreme Court decision, holding that petitioner waived any argument that his § 1983 claim could not be dismissed for failure to exhaust administrative remedies by failing to timely raise it, conflict with relevant decisions of this court?

LIST OF PARTIES

Of the Respondents listed in the caption of the petition, only William McMullen and Caroline Venusti are parties subject to the petition for writ of certiorari. Baum received a favorable jury verdict, and was not involved after the trial. Special Verdict; Appendix 40-43. The jury verdicts against Cameron and McLeod were vacated by the Alaska Supreme Court as not supported by the evidence. *Cameron v. Beard*, 864 P.2d 538, 549-550 (Alaska 1993) (*Beard II*). The State of Alaska is not the proper subject of a 42 U.S.C. § 1983 claim. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Burle Beard's petition arises out of a state court action filed in 1987, complaining of work-place frictions dating from 1985. *Beard v. Baum*, 796 P.2d 1344, 1347 (Alaska 1990) (*Beard I*). A second appeal was decided in 1993. *Cameron v. Beard*, 864 P.2d 538 (Alaska 1993) (*Beard II*). An opinion in a third appeal was published in 1997. *State v. Beard*, 948 P.2d 1376 (Alaska 1997) (*Beard III*). The *Beard III* opinion was then modified upon rehearing in 1998. *State v. Beard*, 960 P.2d 1 (Alaska 1998) (*Beard IV*). Beard's petition for writ of certiorari fails to assert that he at any time raised his federal issue--that his 42 U.S.C. § 1983 claims could not be dismissed for failure to exhaust state administrative remedies--before the state trial court. His petition acknowledges he did not raise the issue during *Beard II* at all, nor in the third Alaska Supreme Court appeal until he filed a petition for rehearing. The ruling by the Alaska Supreme Court in *Beard IV* that Beard waived his federal constitutional argument does not conflict with relevant decisions of the United States Supreme Court.

STATEMENT OF CASE

The facts set out by Beard in his petition are disputed. Beard was not a State of Alaska Department of Transportation (DOT) employee who, as a union representative, discovered routine misuses of state time and property and felt compelled to report them. Petition for Writ of Certiorari at 3. Beard's 1985 diary entries, admitted into evidence at trial, reveal he was already a disgruntled and hostile DOT employee before becoming a union representative and before he claims he discovered misuse of state resources:

> February 12, 1985: Told Harold, my boss, I want the job of Negotiator which will be opening soon....Think I shocked him cause he believes I don't care about it + the way he's passed me over before. . . .
>
> February 25, 1985: . . . Depressing day at work; saw a memo from the boss, Harold, to Juneau, requesting all sorts of changes in higher "grades" (promotions) to apparently by-pass me again. I'm getting paranoid, or at last seeing the truth. I'll find out in a few weeks or months.
>
> March 21, 1985: Went to see APEA (St Empl. Union) to see where I stand in regards to Harolds recent,

+ long passed actions regarding the job. (my boss). . . .
March 23, 1985: Warm today. Got up about 3 am w/ neck hurting a bit + thinking on my gripe against the boss. . . .

March 25, 1985: Went to breakfast then returned home where I continued writing an update on my job experience in hope of getting an upcoming promotion.

March 26, 1985: . . . APEA will type all the info up + attempt to get me a promotion, my first in 9 yrs, 7 mos. . . .

April 3, 1985: Interviewed for Pam's R/W III . . .Harold had to interview me for the III he wants Pam to get. Will see she gets it regardless, but I don't know why; what has she got on him? Will let it go + file a grievance. . . .

April 5, 1985: . . . Got a copy of my updated appl'n to Harold but he took off this afternoon so hasn't seen it nor a memo I wrote requesting a negotiating assignment. He'll shit Monday. . . .

April 8, 1985: . . . Waited for some reaction to my memo to Harold, along w/ my updated appl'n + a letter from APEA saying how well qualified I am. Nothing! However, I heard him say to Sharon, my (in theory) boss: "no place in negotiations, so try to think of

> something." Think Chuck (at office) was right: Harold doesn't want anyone in R/W to tell public about his overly high-paid position. We'll see how it goes. If he gives me a III, I'll still file a grievance for past + present discrimination against most of us. . . .
>
> April 10, 1985: . . .Went to lunch w/ Bruce + Chuck + discussed my problems w/ Harold. Think he think's he's in trouble. Sure hope so. . . . His ass to be reamed, if possible. Attended my first Alaska Public Employees Assoc. meeting as a "Building Representative" after work. Interesting. May help my problem w/ Harold.

Excerpts of Trial Exhibit AA, Appendix 3-12.

Respondents also dispute the contention in Beard's petition for writ of certiorari, that any individual supervisors or co-workers initiated a campaign of criticism, poor performance evaluations, false accusations, or any other conduct intending to develop a pretext for firing Beard. Petition for Writ of Certiorari at 4. Although a jury conclusion found for Beard against four named individual co-workers, the Alaska Supreme Court vacated two of those verdicts as unsupported by any cognizable evidence. *Beard II*, 864 P.2d at

549-550.[1] The respondents maintain that they were legitimately trying to deal with any unproductive employee who spread dissension, did not perform his duties, abused state resources (secretarial personnel and official work hours) in his own campaign, and lied about his use of state time and personnel when confronted. *Beard II*, 864 P.2d at 541.

Beard was employed by the Alaska DOT and did become a union building representative in April, 1985. *Beard I*, 796 P.2d at 1347. He then reported to a number of state and federal agencies a collection of what he called abuses of state time and equipment. *Beard II*, 864 P.2d at 540. He complained that a state employee was going to his personal mail box during working hours, while driving a state vehicle, that an employee was charging eight hours of work per day but only working seven and one-half hours each day, and that an

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[1]An argument not reached by the Alaska Supreme Court in *Beard IV* was that, given the showing that the jury had entered verdicts without any supporting evidence against some defendants, the jury deliberations were obviously flawed and a new trial should be ordered for the remaining defendants. Excerpt of Response to Petition for Rehearing to *Beard III*, Appendix 44-55; *Beard IV*, 960 P.2d at 2.

employee cut a boss's lawn during working hours. Trial Exhibit J, Appendix 13-28. An internal investigation of the complaints was conducted by the DOT Internal Review Section. *Beard II*, 864 P.2d at 541. The internal review substantiated only two of Beard's twenty-one allegations of wrong-doing, and prescribed corrective measures. *Beard II*, 864 P.2d at 541; Tr. Ex. J, Appendix 14.

Beard was dissatisfied with the internal review, demanded an investigation from outside the agency, and "went public" with his allegations of fraud. *Beard II*, 864 P.2d at 541. He ultimately retired in 1986, then filed suit against William McMullen, the DOT director, alleging the torts of misrepresentation, defamation, and Intentional Infliction of Emotional Distress (IIED). *Id.* at 542.

A motion to dismiss the IIED claim was granted after it was not opposed. *Id.* A tardy opposition was filed after the dismissal order was entered, and included an affidavit from Beard's union representative, Bruce Senkow. *Id.* The affidavit was used by Beard to represent that the union would not file Beard's grievance at the time of his

termination. *Beard I*, 796 P.2d at 1349. The dismissal order was not reconsidered, and the defense had no opportunity to review or challenge the Senkow affidavit. *Beard II*, 864 P.2d at 545.

The suit was expanded to add tort claims against five additional individual state employees and a constructive discharge claim against Beard's former employer, the State of Alaska. *Beard I*, 796 P.2d at 1344, 1348. Beard set out nine causes of action, all of which were dismissed or decided on summary judgment in favor of the defendants. *Beard I*, 796 P.2d at 1348.

Beard appealed all issues, and asserted in his opening brief on appeal in two sentences that under 42 U.S.C. § 1983 he had a claim for violation of his free speech rights. Petitioner's Appendix 164. The respondents argued in their 1989 appellee's brief that the state and its employees in their official capacity were not subject to suit under *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). They also asserted, pursuant to *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, 1968), that not all

employee speech was protected speech, and that the trial court had determined that the speech was not protected. Excerpt of Brief of Appellee to *Beard I*, Appendix 29-34.

Beard abandoned the constitutional claims in his Reply Brief in *Beard I*. His summary of request for relief was limited to a remand of the defamation, IIED, and constructive discharge claims:

> For these reasons the summary judgment should be reversed and the case remanded for trial on Beard's claims of intentional infliction of emotional distress, wrongful constructive termination and defamation.

Excerpt of Beard's Reply Brief to *Beard I*, Appendix 35-39.

In 1991 the Alaska Supreme Court found that the tardy, un-examined affidavit by Senkow defeated the state's grant of dismissal as to the constructive discharge and IIED claims. *Beard I*, 796 P.2d at 1349. The court also revived Beard's claim for violation of 42 U.S.C. § 1983, holding that if he were constructively discharged for exercising his free speech rights he had stated a viable claim. *Beard I*, 796 P.2d at 1351. The court noted that his 42 U.S.C. § 1983 claim was

dependent on the resolution of his constructive discharge claim. *Beard I*, 796 P.2d at 1352, n.8. The complaint as to constructive discharge against the state employer was reinstated, as well as the claims for IIED and free speech violation against the individual defendants. *Beard I*, 796 P.2d at 1349, 1353. Beard did not seek, on rehearing of *Beard I*, a ruling that his free speech claims were not tied to the constructive discharge claim.

Upon remand the defendants obtained evidence from Senkow's deposition that the Senkow affidavit had been improperly used, that Beard's complaints of harassment did not relate to the time of his termination, but only related to the union's refusal to grieve job assignments in his job description. *Beard II*, 864 P.2d at 543, n.3; *Beard IV*, 960 P.2d at 3-5. The affidavit's reference to claims of harassment did not relate to the time Beard retired from state employment. *Beard IV*, 960 P.2d at 3.

At the state trial court the defendants renewed their motions for summary judgment. The motions were denied by the trial court because, as the Alaska Supreme later explained

it, the trial court "erroneously interpreted our decision in *Beard I* as conclusively deciding the exhaustion issue." *Beard II*, 864 P.2d at 545. A trial resulted in a jury interrogatory which found constructive discharge against the state government as the employer, IIED damages against three named individual defendants, punitive damages against four individual defendarts, and no damages for the violation of free speech rights. *Beard II*, 864 P.2d at 544. A jury comment added to the verdict form that money could not compensate Beard for loss of any free speech.[2] *Id.* A new appeal, *Beard II*, was then taken.

Although the defendants in *Beard II* argued that they had unfairly been denied the right to press their exhaustion of available administrative remedies defense, Beard did not argue in that appeal, as an alternative reason to support his free speech verdict, that the

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[2]The jury verdict as to the free speech claim is problematic for Beard. Should the petition for writ of certiorari be granted and Beard to prevail in his arguments, his remedy would then be to reinstate the zero verdict.

exhaustion defense did not apply to his free speech claims.[3] *Beard IV*, 960 P.2d at 8.

In 1993 the Alaska Supreme Court vacated the verdicts against two of the named individuals, holding that the verdicts were unsupported by any evidence. *Beard II*, 864 P.2d at 549-550. The court held that the trial court had misunderstood the effect of *Beard I*. The court explained that *Beard I* presented Beard's appeal of summary judgment for the defense, but that at no time had Beard sought summary judgment to foreclose the affirmative defenses. *Beard II*, 864 P.2d at 545. The effect of *Beard I* was merely to reinstate the case for litigation; the affirmative defenses were viable defenses after remand, which the defendants were entitled to pursue and prove. Because the trial court had not allowed the respondents to present evidence on the exhaustion of administrative remedies, the Supreme Court remanded the case for an evidentiary hearing on that issue. *Beard II*, 864 P.2d at 545. Again, Beard did not seek rehearing by the Alaska Supreme Court of *Beard*

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[3] Perhaps because the verdict awarded no money damages Beard in 1993 did not press the argument he makes in the present petition.

II, nor argue that the free speech claim was not tied to the resolution of the constructive discharge issue or that it could not be subject to an exhaustion defense.[4]

After the remand Senkow testified that there was no impediment to Beard filing a grievance under the union agreement at the time of his retirement.[5] *Beard IV*, 960 P.2d at 3-5. The trial court ruled that the union *should have* filed a grievance without Beard's

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[4]Subsequent to the Alaska Supreme Court's decision in *Beard II* the ability of the government as an employer to control employee speech was discussed in *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). In *Waters* the Court held that the government as an employer had more discretion to control speech disruptive of the workplace than to control the speech of the citizenry in general. In the case of speech on a matter of public concern, the potential disruptiveness of the speech by an employee may outweigh whatever First Amendment value the speech may have, so that a violation may not be compensable. *Waters*, 511 U.S. at 680-681, 114 S.Ct. at 1890.

[5]The only evidence of the union's attitude about filing a grievance for constructive discharge is that presented through Senkow, and Beard's girl friend, Evie Seymore. *Beard IV*, 960 P.2d 4. Beard has never by testimony or affidavit challenged Senkow's testimony.

request and, without any testimony on the matter, found the grievance process inadequate. *Beard IV*, 960 P.2d at 4-5. The state and the two remaining individual defendants, William McMullen and Caroline Venusti, appealed the trial court's ruling after the remand of *Beard II*. *Beard IV*, 960 P.2d at 5. Although Beard filed a brief in opposition to the defense appeal, he did not argue in his *Beard III* brief that his free speech claim was independent of the constructive discharge claims or that an exhaustion defense could not bar his free speech claim. *Beard IV*, 960 P.2d at 9.

In *Beard III* and *Beard IV* the Alaska Supreme Court held that the trial court's decision was without factual basis and was also contrary to controlling legal principles. *Beard IV*, 960 P.2d at 6-8. After receiving the opinion in *Beard III*,[6] Beard petitioned the Alaska Supreme Court for rehearing, reciting that the court had committed plain error by

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[6]*Beard III* was first published at *State v. Beard*, 948 P.2. 1376 (Alaska 1997). That opinion has been superseded, with modification to the opinion reflected at *Beard IV*, 960 P.2d at 8-9. May 29, 1998 Clerk's Order on Petition for Rehearing, Appendix 63-64.

not *sua sponte* deciding the appeal with recourse to *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). Excerpt of Beard's Petition for Rehearing, Appendix 54-62. He acknowledged that he had not raised the argument in any of the *Beard II* pleadings or the appeal briefing for *Beard III*. Appendix 55 n. 8.

The defense responded to Beard's petition for rehearing by noting that Beard actually waived his 42 U.S.C. § 1983 claim in his Reply Brief in *Beard I* in 1989, failed to list the argument as an alternative ground to uphold his favorable verdict in *Beard II* in 1994, and failed to list the argument as a point on appeal in 1997 in *Beard III*. The Alaska Supreme Court denied Beard's petition for rehearing on the ground that Beard had waived the argument by not timely raising it. *Beard IV*, 960 P.2d at 9. The court modified its initial *Beard III* opinion to clarify that its decision was based on Beard's failure to raise the issue, and was not a ruling inconsistent with *Patsy*. *Id.*

> Beard's petition for rehearing, filed after we issued our original opinion in *Beard III*, raises an argument he did not previously raise

> in *Beard I*, *Beard II*, or *Beard III*: that his claims against Venusti and McMullen are based at least in part on 42 U.S.C. sec. 1983, and to that extent are not subject to the exhaustion doctrine. He claims that his IIED claims were based on sec. 1983. In support, Beard cites *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and *Diedrich v. City of Ketchikan*, 805 P.2d 362 (Alaska 1991).
>
> Beard failed to assert a timely argument distinguishing between sec. 1983 claims and non-sec. 1983 claims in opposing Venusti's and McMullen's fundamental defense, failure to exhaust, which has been the subject of three appeals and three appellate opinions. He also failed to raise a timely distinction between claims against the State and claims against Venusti and McMullen. Beard has consequently waived the argument that the exhaustion doctrine cannot bar his claims against Venusti and McMullen.

Beard IV, 960 P.2d at 9.

From the denial of the petition for rehearing, Beard seeks review by the United States Supreme Court.

REASONS FOR DENYING THE WRIT

In order to justify review by the Court in this case, Beard must demonstrate that the Alaska Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Beard attempts to meet this threshold by claiming that the Alaska Supreme Court has held that failure to exhaust state administrative procedures is a defense to a 42 U.S.C. § 1983 claim. However, the court has not in fact made such a holding. In *Beard IV*, the Alaska Supreme Court determined only that Beard had waived the argument that exhaustion could not be a defense to a § 1983 claim. *Beard IV*, 960 P.2d at 9. The Alaska Supreme Court expressly declined to reach the merits of Beard's argument on rehearing, because it found the issue was not raised in a timely manner. Therefore, the Alaska Supreme Court's holding does not conflict with *Patsy v. Board of Regents*, 457 U.S. 496 (1982), or any other decisions of this Court. There is no reason for the Court to grant Beard's petition.

I. BEARD HAS NOT ESTABLISHED THAT HE RAISED THE EXHAUSTION ISSUE IN THE CONTEST OF HIS § 1983 CLAIM IN STATE COURT

As an initial requirement, a petition for writ of certiorari must include a statement setting out when the petitioner raised the federal question in the state trial and appellate courts. Supreme Court Rule 14.1(g)(i). Not only has Beard failed to show he timely raised his federal question in the highest Alaska state appeals court, he has failed to show that he ever raised the issue with the state trial court. His two sentence reference to the argument in his brief in *Beard I* contains no record citations to having raised the issue with the lower court. Petitioner's Appendix 164. Beard's present petition for writ of certiorari is fatally defective because he did not raise the issue or develop his argument at the state trial level.

Beard claims he preserved his issue in 1989 with two sentences in his brief of Appellant in *Beard I*. Petitioner's Appendix 164. However, he then abandoned the issue in his reply brief in *Beard I*. Appendix 35-39. Even without the abandonment in his reply

brief, two sentences filed two appeals and nine years earlier could not and did not properly raise the issue for consideration by the Alaska Supreme Court in *Beard III*. The issue was not raised in the initial briefing in *Beard III*, and was only placed before the Alaska Supreme Court on rehearing.

In *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed. 2d 203 (1997), this Court refused to review an Alabama decision, after initially granting certiorari, when it became apparent that the federal question at issue had only been superficially treated in the appellant's opening brief before the Alabama Supreme Court. *Id.* at 1030. The Court stated its rule in reviewing State Court judgments that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision" to be reviwed, with only "very rare exceptions." *Id.* at 1029. The Court declined to decide whether the requirement that the federal question be properly presented in the state court defeated jurisdiction, or whether the defect compelled dismissal as a simple matter of judicial prudence. *Id.* at 1031. In

dismissing the *Adams* writ the Court noted that the states' highest courts have an understandable interest in resolving constitutional issues, and that the failure to properly raise the issue handicaps the United States Supreme Court by not having a proper record and not giving the parties an opportunity to refine their positions before reaching the Court. *Id.* at 1031. The petitioner in *Adams* apparently sought to excuse the superficial briefing in the state court appellate brief by showing that the issue was also presented in a petition for rehearing before the Alabama Supreme Court. *Id.* at 1031, n.3. The United States Supreme Court was not persuaded by the petitioner in *Adams*, specifically instructing that the court generally refuses to consider issues first clearly raised in a petition for rehearing. *Id.* at 1031, n.3.

Beard is on even weaker ground than the petitioner in *Adams*. Beard did not raise his federal question at all in *Beard III* until he petitioned for rehearing. *Beard IV*, 960 P.2d at 9. For that reason alone, under *Adams*, no writ of certiorari should issue. Moreover, even considering the totality of the state

court appellate proceedings in this case, there is no basis for granting a writ. Beard failed to adequately or timely put the § 1983 issue before the Alaska Supreme Court. He addressed the federal question in *Beard I* in a mere two sentences in 1989, then abandoned the argument in his reply brief, did not raise the issue at all in 1993 in *Beard II*, and only raised the issue in *Beard III* in 1997 in a petition for rehearing. This treatment of the issue at the state court level defeats his claim that this Court should grant review. *Adams* disposes of Beard's argument that a "failure to brief" rule should not prevent the issuance of a writ of certiorari. *Id.* at 1029-1031.

II. THE ALASKA SUPREME COURT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

A discretionary writ of certiorari is reserved for resolution of only the most significant federal questions. In this case Beard must show that the decision of Alaska's highest court on a federal question conflicts with relevant decisions of the United States Supreme Court. Supreme Court Rule 10(c). This he cannot do. The Alaska Supreme Court has not

entered any decision with precedential force which conflicts with controlling decisions of this Court. The Alaska Supreme Court's decision in *Beard IV* merely declined to address an argument raised for the first time in nine years, on rehearing of the third appellate decision in this case.[7] Beard asked the Alaska Supreme Court to conclude on rehearing of *Beard III* that it committed "plain error" under the Alaska rules by failing to *sua sponte* raise the issue of the interplay between the exhaustion of administrative remedies and the exercise of free speech by government employees, in a context where the employee was not fired, but only claimed after retiring to have been "constructively discharged." The Alaska Supreme Court declined to conclude it had committed plain error by failing to anticipate this new argument or open the door for more briefing on issues which had not been considered by the lower trial court. Instead, the court found that Beard had waived the argument he now presents to this Court, and

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[7]Nine years earlier the argument was given such cursory treatment it was inadequately briefed. Petitioner's Appendix 164.

declined to reach the merits of that issue. Consequently, *Beard IV* does not decide the question of whether a § 1983 claim can be barred for failure to exhaust state administrative remedies, nor decide any federal question, in a way contrary to relevant decisions of this Court.[8]

CONCLUSION

The petition should not be granted because the state court decision at issue, *Beard IV*, does not conflict with a relevant decision of the United States Supreme Court. The federal question was not raised in the state trial court, and was not properly presented for consideration by the Alaska Supreme Court.

Respectfully submitted this 28th day of September 1998.

Bruce M. Botelho
Attorney General

Susan D. Cox
Assistant Attorney General

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[8]The Alaska Supreme Court's refusal to consider the merits of the issue once belatedly raised is in fact consistent with this Court's approach. *See Adams*, 117 S.Ct. at 1029-1030.

APPENDIX

No. 98-351

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BURLE B. BEARD,

Petitioners,

v.

DAN BAUM, HAROLD CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN c. SISK, CAROLINE VENUSTI, and the STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The Alaska Supreme Court

AFFIDAVIT OF LISA TAYLOR

Exhibit No. AA (case no. 4FA-87-369 CI) was typed from hand-written notes. The spelling of certain words were typed as seen or to the best of my knowledge.

Dated this 23rd day of September 1998 at Juneau, Alaska.

/s/
Lisa M. Taylor, Legal Secretary
Department of Law, State of Alaska

SUBSCRIBED AND SWORN TO before me this 23rd day of September 1998.

/s/
Pamla Credo-Hayes
Notary Public for Alaska
My commission expires: 2000

TRIAL EXHIBIT AA

EXCERPT FROM BEARD'S 1985 DIARY ENTRIES

Tuesday, February 12, 1985

Told Harold I want a promotion. Told Harold, my boss, I want the job of negotiator which will be opening soon. I'm the only one on the St. Register for R/W Agent 18 in the Fbx area that I know of; the only one qualified in other words. Think I shocked him cause he believes I don't care about it & the way he's passed me over before. One of the fellow workers needed a lift to Sandwick St. after work so went to video tape rental outfit first to buy a punch card of tape rentals for Patty's birthday. Took Deano to his pickup then home. Brot in wood, reloaded the bird feeder w/more sunflower seeds & loafed awhile. Laurie called about 7 PM & we went down for Patty's birthday party. She got a sweater & socks from Evie.

Wednesday, February 13, 1985

Ice foggy today. Remained cold all day the by 4:30 P the temp was about -8°.

Shopped a bit then home. Didn't do much this evening. New renter came over & asked if my

garage was warm -- his cold-running car is getting colder. Told him I would help him tomorrow evening to put in his new thermostat. Too dark presently.

Sunday, February 24, 1985

Went to breakfast at the Fbx Bakery then back to get in wood, shovel some snow & break some ice from the laundry room roof. Later, while Evie napped, I worked on cabin records & my cking acct. Changed doggy papers, brot in ice chunks to melt for water & read the Sun. paper.

Ironed pants & shirts for Carlos(?) to wear at work. Tried on older pants & shirts to see if they fit; if not I set them out for Salvat. Army. Good clothes too.

Monday, February 25, 1985

Took the pkup to work & afterwards dumped the trash & home to shovel the snow from the pkup bed.

Brot in a load (use wheelbarrow from firewood stack by shed to house) of firewood, then a bucket of ice (from the laundry room roof

clearing Sun.). Fed the pups, all five, & the cats, cat & kitten.

Daylite upon leaving the hse for work this morning at 7:30 AM. Daylite lasting til about 7:30 PM.

Depressing day at work; saw a memo from the boss, Harold, to Juneau requesting all sorts of changes in higher "grades" (promotions) to apparently by-pass me again. I'm getting paranoid, or at last seeing the truth. I'll find out in a few weeks or months.

Thursday, March 21, 1985

Went to see APEA (St. Empl. Union) to see where I stand in regards to Harolds recent & long passed actions regarding the job. (My loss).

Fellow there says he thinks I have suff. grounds to file a grievance. I'll see him again tomorrow w/more documentation & info.

Friday, March 22, 1985

Very warm & bright. Quit work at 2:30 P.M. & visited APEA office.

Cheech & Chong
Bland Mellon Chitten
I can still get it up; I just can't get it in.

Saturday, March 23, 1985

Warm today. Got up about 3 AM w/neck hurting a bit & thinking on my gripe against the boss. Came downstairs for 1 ½ hrs or so then to bed. This morning about 7:30 AM my neck was just killing me. Don't know if it's part of slamming my head on the ice last Sat. nite or no. Went to town for breakfast, shopped, went to ck. on the airplane then waited Trix & Patty. Picked up a neighbors (asshole) dog & took it to the pound. Came home & tried napping.! No go. Evie pulled up the carpet & prepared the subfloor for gluing down T&G wood strips as new surface. I wrote an update of my job Appl. w/the State, which I'll let the fellow at APEA (Union) see before I type it & send it in. Quit about 7 PM & made a beer run to College. Evie went with Trix to watch Patty play volleyball at West Valley.

Sunday, March 24, 1985

Up very early-sore neck. Read awhile then began writing on my job application update.

Wrote most all day but took a break for a run to town for a new, fine point saw with which Evie could cut the wood strips she's gluing to the living area floor. Finally gave up about 6 PM. Read the paper & loafed.

"Doc said if I don't quit drinking I'd lose my hearing. I told him what I was drinking was a lot better than what I was hearing."

Monday, March 25, 1985

Holiday. Went to breakfast then returned home where I continued writing an update on my job experience in hope of getting an upcoming promotion.

A fellow found an envelop w/$24 & 3 soy beans inside while looking thru his wifes dresser. He asked about it & she said she had been unfaithful & each time she earned a soybean. He said he too had been unfaithful a couple of times but they should forgive and forget. She agreed. He asked what the $24 was for. She said that when soy-beans hit $8/bushel, she sold!

Tuesday, March 26, 1985

Renter left-refunded damage & unused rent. Had a bunch for Glen Potts, fellow who came into appraisal about 2+ yrs. ago. He's leaving to join Walt & fee-appraise. After work I took a copy of an appraisal I did several years ago, "Nome Seawall," along with copies of all the certif's I've accumulated over the years at classes, courses & seminars, all dealing w/DOT&PF. R/W (right of way). Took along copies of parcel plats I've drawn as a draftsman-which I've been doing now for 15 months. APEA will type all the info up & attempt to get me a promotion, my first in 9 yrs, 7 mos. Brot in wood, inspected cabin No. 1 w/renter & refunded hes some money then loafed.

Wednesday, April 3, 1985

Interviewed for Pams R/W III. Harold had to interview me for the III he wants Pam to get. Will see she gets it regardless, but don't know why; what has she on him? Will let it go & later file a grievance.

Gone to APEA (our Union) & signed my updated appl'n. Still some typing to do on the "attached" pages tho.

Got home after work & spent some time fitting a too-large handle into my log-splitting maul then used it. Cold!

Thursday, April 4, 1985

Picked up my completed job appl'n update from APEA, our Union & took it home to read.
Split wood, fed dogs etc.
Boro dog catchers came up later said they had complaints about my dogs. Told them of the assholes & hippocrits on the hill. Loafed.
(Con't from next page)

Peter said: "Oh, no; you didn't want to sit w/them. They're going to Hell for lying; you & I are going to Bakersfield!"

Friday, April 5, 1985

Went to lunch w/Bruce & Steavy at Safeway Mall. Got a copy of my updated appl'n to Harold but he took off this afternoon so hasn't seen it nor a memo I wrote requesting a negotiating assignment. He'll shit Monday.

Three fellows at the pearly gates. St. Peter asked the first if he'd been faithful to his wife. "Oh, no. Never even thought of another

woman." He told the fellow to sit on his left. He asked the second fellow the same: "Oh, yes. Stayed true all my life." St. Peter said "sit on my left." he asked the third fellow who said he dollied w/a gal in Bakersfield a week before he died & she was great, but now he was sorry. St. Peter told him to sit on his right. He said he'd like to sit w/the others. St. -- See April 4--

Saturday, April 6, 1985

Cool all day tho bright. Visited Laurie & Trix (told me a joke--see Fri. page) then into town to buy some base cabinets for Cabin No. 1. Got them & went towards Foodland but the truck almost gave up. The vibration damper (lower pully) came loose & the engine over heated. Couldn't fix it (left my tools home) so worked my way back by running a ways then shutting off the engine to coast or, on occassion, stopped to let it cool. Got it tightened, at least for awhile then brot some things in from the pkup. Evie called as I walked in. She needs some things so I got in the car & back to town. Spent lots, & home to spend more then try to get it on the airline

Monday before 2 PM. Packed some of it then loafed. Pooped.

Sunday, April 7, 1985

3-wheeled down to Laurie & Trix's & put some candy eastereggs here & there--cold. Loafed some this AM & cleaned up a few things.

Went back down on the sno-go about 1:30 PM & stayed the day. Returned after dinner & a movie, about 10 PM.

Monday, April 8, 1985

Let up a little now & then, but for the most part, it snowed all day. Still at it this evening at 8 PM.

Waited for some reaction to my memo to Harold, along w/my updated appl'n & a letter from APEA saying how well qualified I am. Nothing! However, I overheard him say to Sharon, my (in theory) boss, "no place in negotiations, so try to think of something." Think Chuck (at office) was right: Harold doesn't want anyone in R/W to tell public about his overly high-paid position. We'll see how it goes. If he gives me a III, I'll still file

grievance for past & present discrimination against most of us.

Bot an 18" wide base cab. tonite & assembled one of the 30" base cab. I bot Sat.

Wednesday, April 10, 1985

Went to lunch w/Bruce & Chuck & discussed my problems w/Harold. Think he thinks he's in trouble. Sure hope so. Steavy, secretary, says Harold is becoming polite to her. He never was before so think he's aware she's helping me. His ass is to be reamed, if possible. Attended my first Alaska Public Employees Assoc. meeting as a "Building Representative" after work. Interesting. May help my problem w/Harold.

Snow began this afternoon & temp. dropped a bit.

TRIAL EXHIBIT J

TO: William McMullen, Director
Design and Construction Northern Region
FILE NO: 010-1390

Thru: Glen Glenzer, Deputy Commissioner, Northern Region

FROM: Robert W. Janes, CPA /s/
Chief, Internal Review
Department of Transportation & Public Facilities
Date: August 21, 1985
Telephone no.: 465-2080

SUBJECT: Allegations of Wrongdoing in Right of Way Section Audit 85-SF-18

The Fairbanks Internal Review office has made a review of certain allegations made against several persons in the Fairbanks Right of Way (ROW) Section of the Department of Transportation and Public Facilities (DOT&PF). The allegations were brought to the attention of Internal Review through a letter from the Attorney General's office forwarding a letter they had received from the U.S. Department of Transportation, Office of the Inspector General. Mr. Burle Beard had written to them alleging that personnel in the ROW Section were abusing the use of State owned vehicles and improper use of state time.

Mr. Beard was contacted and he made certain verbal and written allegations that he gave to the reviewer. These allegations are listed in Appendix A.

There were twenty one allegations against the ROW Section, however, there are only two which are considered valid based on the additional evidence gathered during our interviews.

The allegation that Arnold Tornell used a state car on state time to pick up his personal mail is correct. Arnold Tornell stated that on numerous occasions he had picked up his personal mail at the Post Office, but only when he was downtown on state business. At this point in time, and based on our interviews, it is virtually impossible to determine whether the trips were really necessary or not. However, the fact remains that some state business was regularly conducted by Mr. Tornell downtown. Mr. Tornell is now retired from State government.

Also, an allegation was made that Dan Baum attended Borough Platting Board meetings

and charged his time to projects. This allegation is correct. Mr. Baum was allowed to attend board meetings (he was a member of the Platting Board) by his supervisor and the Chief ROW Agent because it was considered in the best interest of the State and the Department to have an employee on the Board. In our opinion, Mr. Baum did not charge his time properly as it should have been charged to overhead and no a specific project. Mr. Baum charged his meeting time to the project which he worked on prior to the meeting. Over the 10 month period up until April of 1985, Mr. Baum was on the Platting Board, meeting two Wednesdays per month at 3:00 pm. At that time, the workload in the ROW Section was such that Mr. Baum was not able to leave work for the Platting Meeting until 4:30 or 5:00 pm.

Mr. Baum's time which was charged to projects rather than overhead is as follows:

State Maintenance Projects	1.5	hrs.	$ 60.12
* Alaska Highway Mile 1270-1285	3.0	hrs.	120.24
* Delta Erosion Control	1.5	hrs.	60.12
* Alaska Highway Mile 1256-1270	6.0	hrs.	240.48

Healy-Otto Lake Access Road	1.5 hrs.	60.12
* South Fairbanks Expressway - East	7.5 hrs.	300.60
Total	21.0 hrs.	$841.68

*Indicates Federal-Aid projects.

RECOMMENDATIONS:

1. That Regional management remind employees that State vehicles are for official use only and are not to be used for personal business.

2. Management should provide an overhead project account so that time charges for CIP personnel with other administrative duties can be charged to an overhead account rather than to a project as is now done. If the Region concurs, an adjustment for the above mentioned federal-aid projects should be made. A copy of that adjustment should be forwarded to our office and we will provide a copy to the Federal Highway Administration to close our audit file.

cc: R.J. Knapp, Commissioner, DOT&PF
Bill Cummings, Assistant Attorney General
Gayle Savage, AG Criminal Investigation

CONFIDENTIAL
DEFENDANT
EXHIBIT NO. J
ADMITTED
4FA 87-369 CI

Audit 85-SF-18

Appendix A TO TRIAL EXHIBIT J

Mr. Burle Beard's allegations against members of the Right of Way staff are listed below and then are followed by a summary of this review's conclusions:

Allegations Against the Following Individuals:

A. Harold Cameron

1. He directed Walt Werner to change the value of his appraisal on Ebenal Parcel to facilitate the negotiation of the parcel.

2. He made Walt Werner change Walt's personnel evaluation of Dan Baum.

3. He signed Arnold Tornell's timesheets (many times) knowing Arnold had only worked 7 1/2 hours a day rather than the 8 hours a day as reported and approved.

4. He permitted Arnold Tornell to use a state car to pickup personal mail at the Post Office on state time.

5. He attempted to get extra pay for Dan Baum through a retro promotion.

6. He discriminated against Charles Moyer when Sharon McLeod was hired as Relocation Supervisor, he discriminated against Steevyn Cysewski when she was passed over twice when two persons from outside the Department were hired, and he discriminated against Burle Beard by not promoting him in 9 1/2 years and not providing cross training so that he could become eligible for a promotion.

7. He refused appraisal training for Walt Werner and Glen Potts.

8. He signed Pam Lewis's Position Description Questionnaire (PDQ) knowing that the information contained on the PDQ was not true.

9. He put pressure on Rich Kendall to do a "hatchet job" on John Evans so he would quit.

10. He has been secretive about ROW positions becoming available for promotion until his "favorites" are appointed.

B. Arnold Tornell

1. He picked up his personal mail in a state car during working hours and charged this time to projects.

2. He constantly charged 8 hours per day on his timesheet but only worked 7 1/2 hours per day.

3. He is receiving retirement benefits greater than he is entitled to because of the additional base pay received as a result of (2) above.

c. Pamela Lewis

1. She falsified her PDQ to get her present position (range 18).

2. She used a state car to hunt for a house for Harold Cameron when he was moving from Juneau to Fairbanks and charged this time to projects.

D. Dan Baum

1. He used state car to hunt for a house for Harold Cameron and then charged the time to projects.

2. He cut Harold Cameron's lawn while Harold was on vacation and then charged the time to projects.

3. He has attended Borough Platting Board meetings on state time and charged time to projects.

E. Sharon McLeod

1. She (and Dan Baum) approved Arnold Tornell's timesheets.

2. She conspired against Charles Moyer by taking the job which "Chuck" was better qualified for.

F. Jane Brownfield

1. She may have falsified information on her employment application when she returned to employment in the ROW Section about 1-1/2 years ago.

CONCLUSIONS:

A.1. Harold Cameron directed Walt Werner to change the value of his appraisal for the Ebenal parcel on the University Avenue to facilitate negotiation of the parcel.

During an interview, Walt Werner stated that Harold Cameron had directed him to decrease the appraised value of the parcel as it was too high. When Harold Cameron was asked about this parcel he

stated that he did not recall giving Walt Werner any such directive.

A review of the ROW files shows Parcel 7 on A3775 Fairbanks Expressway West as Ebenals but the appraiser was Glen Potts and not Walt Werner. A search of the files failed to produce an appraisal for Ebenals on Parcel 7 RS-M-0617(1) University Avenue South. A call to Juneau Headquarters disclosed there was no appraisal copy there. A call to Fairbanks Attorney General's Office disclosed that although the parcel had been condemned, they had no copy of the parcel appraisal as all their files had been sent to Juneau to Archives.

This parcel is 8 years old, the appraisal was apparently for $9,000-00 (this is the amount deposited with the court) and the final judgement was for an award of $15,000.00, therefore, there appears to be no evidence available which would support the allegation.

A.2. Harold Cameron made Walt Werner change Walt's personnel evaluation of Dan Baum.

Mr. Cameron stated that he has no recollection of ever directing Walt Werner to change a personnel evaluation which Walt had prepared. A review of the personnel file of Dan Baum disclosed that Stan Constantine prepared the first two personnel evaluation reports on Dan Baum in 1974-1975 and all others were prepared by Arnold Tornell.

Therefore, there appears to be no grounds for the above stated allegation.

A.3. He signed Arnold Tornell's timesheets (many times) knowing Arnold had only worked 7-1/2 hours a day rather than the 8 hours a day as reported and approved. See B.2. Comments.

A.4. Harold Cameron permitted Arnold Tornell to use a state car to pick up private mail at the post office on state time. Harold Cameron stated that he had never authorized the use of a state car, during working hours or otherwise, for private use of any sort (see B.1.).

A.5. Harold Cameron attempted to get extra pay for Dan Baum through a retro-promotion.

Mr. Baum has filed a grievance with the State on the above and this is pending in the administrative process to settle employee grievances. The settlement of the grievance should determine if there were any improprieties in Mr. Cameron's actions.

A.6. Harold Cameron discriminated against Charles Moyer when Sharon McLeod was hired as Relocation Supervisor, he discriminated against Steevyn Cysewski when she was passed over twice when two persons from outside the Department were hired, and he discriminated against Burle Beard by not promoting him in 9-1/2 years and not providing cross training so that he could become eligible for a promotion.

a) Charles Moyer stated that he did not feel he was discriminated against. He said he was not on the register and he was not as well qualified as Ms. McLeod.

b) Ms. Cysewski was only on one of the two registers for the positions in question.

c) Burle Beard's personnel record indicates that contrary to what Mr. Beard has indicated in the above allegation, he has received training on at least 15 different times in all facets of ROW operations. Also his last promotion was 8 years ago not 9-1/2 years.

In all cases cited in the allegation, it was found that all personnel hiring regulations were complied with, all registers were worked in the proper manner and the successful candidates were all selected from the top 5 candidates on all registers.

It is to be management's determination as to which candidate is chosen in the highest five candidates on a register which does not have to be the highest scoring candidate.

A.7. Harold Cameron refused appraisal training for Walt Werner and Glen Potts.

Mr. Cameron stated that he probably did refuse training to Walt Werner and Glen Potts as the project priorities and scheduling would dictate who can be spared from project work to attend a training session rather than just the wishes of the employee.

A.8. Harold Cameron signed Pam Lewis's PDQ knowing that the information contained on the PDQ was not true.

There was no indication that Pam Lewis's PDQ contained any untrue statements.

A.9. Harold Cameron put pressure on Richard Kendall to do "a hatchet job" on John Evans so that he would quit.

Interviews with Harold Cameron and all members of the ROW Engineering unit indicated that John Evans was having problems with transposition of numbers and other aspects of the ROW Engineering operation. The interviews indicated that John Evans was experienced in the preparation of aviation design plans but was having difficulty in adapting to the ROW Engineering methods and procedures which was causing problems with project scheduling and engineering production. Finally due to frustration brought on by this condition and Richard Kendall's pressuring him to complete accurate ROW Engineer information caused John Evans to retire about one year prior to his planned retirement.

A.10. Harold Cameron has been secretive about Right of Way positions becoming available for promotion until his "favorites" are appointed.

While it is true, that in a number of cases in hiring or promoting ROW personnel, the position was not common knowledge among all the ROW personnel, it is also each individuals responsibility to make sure their name is on any State registers for positions to which they may aspire.

B.1. Arnold Tornell picked up his personal mail in a state car during working hours and charged this time to projects.

Mr. Tornell stated that he did pick up his personal mail quite often during working hours but in all cases it was while he had some type of business to conduct downtown such as city or borough business, business with the Attorney General's Office, the Recorders Office or one of the downtown banks.

The evidence is somewhat inconclusive and contradictory regarding this allegation, however, as there is a large amount of evidence suggesting this, there may have been a valid problem prior to Mr. Tornell's retirement.

B.2. Arnold Tornell constantly charged 8 hours per day on his timesheet but only worked 7-1/2 hours per day.

Mr. Tornell stated that it was not true that he only worked 7-1/2 hours a day because he had some evening appointments and also some weekend appointments, and overall these would balance out and more than equal the 1/2 hour per day specified in the APEA supervisors contract.

This is consistent with other supervisory personnel in the Department who are performing similar duties. The supervisory contract did not specify when the 1/2 hour was to be worked.

Based on the above and the writers knowledge of other supervisors throughout the Department, there appears to be little basis for the allegation.

B.3. Arnold Tornell is receiving retirement benefits greater than he is entitled to because of the additional base pay received.

If allegation number B.2. against Mr. Tornell is not valid, then there is no validity to this allegation.

C.1. Pamela Lewis falsified her PDQ to get her present position (range 18).

There is no indication that Pamela Lewis falsified her PDQ.

C.2. Pamela Lewis used a state car to hunt for a house for Harold Cameron when he was moving from Juneau to Fairbanks and charged this to projects.

While there were rumors that the above allegation had occurred there was no substantiating evidence to indicate that his allegation was true.

D.1. Dan Baum used a state car to hunt for a house for Harold Cameron and then charged the time to projects.

Mr. Baum stated when interviewed that he had twice driven by a house which was for sale, while he was travelling between his office at Peger Road and the downtown Attorney General's Office. However, this was the extent of his search except for a number of phone calls (most all during lunch hour) to realtors.

There was no evidence found to indicate otherwise.

D.2. Dan Baum cut Harold Cameron's lawn while Harold was on vacation in June, 1984 and then charged the time to Federal and/or State projects.

Mr. Baum state that he had cut Harold's lawn for him, but it was in the evening and on Saturday and not during state working hours. There was no evidence found to indicate otherwise.

D.3. Dan Baum attended Borough Platting Board meetings on state time and charged this time to project.

Mr. Baum was appointed to the Platting Board on the recommendation of several DOT&PF personnel. It was perceived by Mr. Baum; Arnold Tornell, his supervisor; and Harold Cameron, Chief ROW Agent for Northern Region that the appointment to the Platting Board was of benefit to the state and Department and the time served during working hours would be part of normal work duties. Mr. Baum's time was charged to the project which he worked on the day of the Platting Board meeting. Over the 10 month period up until April, 1985 Mr. Baum was on the Platting Board, meeting two Wednesdays per month at 3:00 pm. However, the workload in the ROW Section became such that Mr. Baum was not able to leave work for the meeting until after state quiting time.

Mr. Baum's time which had been charged to projects rather than overhead is as follows:

State Maintenance Projects	1.5 hrs.	$ 60.12
* Alaska Highway Mile 1270-1285	3.0 hrs.	120.24
* Delta Erosion Control	1.5 hrs.	60.12
* Alaska Highway Mile 1256-1270	6.0 hrs.	240.48
Healy-Otto Lake Access Road	1.5 hrs.	60.12
*South Fairbanks Expressway - East	7.5 hrs.	300.60
Total	21.0 hrs.	$841.68

*Indicates Federal-Aid projects.

E.I. Sharon McLeod (and Dan Baum) approved Arnold Tornell's timesheets (which reported 8 hours and not 7-1/2 hours).

The State Administrative Manual does not address the authority for timesheet approval as timesheets are a Department function. The only requirement found for DOT&PF was that there was a signature in the supervisor line. This then means that it is not who signs or that they are certifying the timesheet information. Therefore, under current Policy and practice, the person signing the supervisors signature line on the timesheet is not approving but rather is signing so that the timesheet may be processed by the time reporting system.

E.2. Sharon McLeod conspired against Charles Moyer by taking the job which "Chuck" was better-qualified for.

See response to allegation A.6.

F.1. Jane Brownfield may have falsified information on her employment application when

she returned to employment in the ROW Section about 1-1/2 years ago.

The evidence would not support this allegation.

IN THE SUPREME COURT FOR THE STATE OF ALASKA

BURLE B. BEARD, Appellant, v. DAN BAUM, HAROLD A. CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN C. SISK, and CAROLINE C. VENUSTI individually and as employees of the STATE OF ALASKA; and THE STATE OF ALASKA, Appellees.	)

Superior Court No. 4FA-87-369 Civil
Supreme Court No. S-3229

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA,
FOURTH JUDICIAL DISTRICT
JAY HODGES, JUDGE

BRIEF OF APPELLEE

DOUGLAS B. BAILY
ATTORNEY GENERAL

By:

/s/
Raymond Funk
Assistant Attorney General
100 Cushman St., Ste. 400
Fairbanks, AK 99701
(907) 452-1568
Attorney for State of Alaska
Appellees

Filed June 22, 1989, in the

Supreme Court of the State
of Alaska
David A. Lampen, Clerk

By: /s/
Deputy Clerk

Ex. 1

II. The superior court correctly granted summary judgment as to the Section 1983 constitutional claims and did not err in finding the state cannot be sued.

Beard asserts that the superior court erred in ruling that the state and its employees acting in their official capacities are not "persons." [At. Br. 42-43] Beard is referring to the superior court's grant of summary judgment to defendants as to count IX of the amended complaint. [R. 576-77]

The superior court held that the state and individual state employee defendants are immune from suit on alleged violations of 42 U.S.C. § 1983 under Vest v. Schafer, 757 P.2d 588 (Alaska 1988).

Beard offers no argument to the contrary, merely noting that the issue is before the U.S. Supreme Court in a Michigan case. [At. Br. 42-43] That case has just been decided, and holds that states and state officials sued in their official capacities are not "persons"

under 42 U.S.C. § 1983. Will v. Michigan Dep't of State Police, ___ U.S.L.W. ____ (June 15, 1989).

III. The superior court did not err in finding that individual defendants were protected in their individual capacity from section 1983 claims.

The superior court then went on to consider the question of whether the state employee defendants could be sued in their individual capacities or were protected under qualified or good faith immunity. This question was considered in light of Beard's claims that his disruptive activities were protected speech with the court concluding they were not. The superior held:

> It is clear that under the facts of this case, Beard's public comments are not protected to the extent that qualified immunity does not apply. Prior to Beard's statements, a full investigation had been done; his actions were disruptive to his working relationship with fellow employees. Defendants' conduct in ordering Beard to refrain from further statements, when viewed objectively, was reasonable. [State v. Haley, 687 P.2d 305 (Alaska 1988)]

> Even if there is no qualified immunity, Beard's actions are not constitutionally protected. Beard's statements do not address a legitimate issue of public concern. The State thoroughly investigated Beard's allegations. They gave him a complete report of the investigation. Each of Beard's specific allegations were addressed, explaining the conclusions and setting forth remedial measures where applicable. In spite of this investigation, Beard continued to focus on the alleged fraud. The State told Beard that unless he could present new allegations or new evidence he should stop discussing the allegations on work time. In light of the evidence of disruption in the work place, this directive to Beard seems reasonable. In this factual context, Beard's speech was not protected.

[R. 577-78]

Beard claims on appeal that Beard's speech was so protected as to defeat the qualified immunity available to state officials. The claim by Beard is that his constructive discharge violated his First Amendment free speech right and that thus the defendants are liable for breach of his civil rights.

The primary Alaskan case on this issue is Wickwire v. State, 725 P.2d 695 (Alaska 1986).

In Wickwire, this court adopted the balancing test enunciated by the U.S. Supreme Court in Pickering v. Board of Education, 391 US 563, 20 L.Ed.2d 811, 88 S. Ct. 1731 (1968). It balances the government employer's interest in promoting efficiency in its operation with the employee's interest in commenting on matters of public concern.

> In balancing these interests, seven factors are considered, including whether the speech has an impact on the government's operation and on the employee's daily job performance, and whether the speech addresses an issue of legitimate public concern. The latter factor is a threshold requirement. If an employee's speech does not relate to a "matter of political, social or other concern to the community," the court need not scrutinize the reason for the discharge.

725 P.2d at 700. The trial court never got any further in its analysis than finding that Beard's allegations did not rise to the level of public concern.

First, Wickwire is not directly applicable because Beard was not fired like Wickwire. Thus, the court can't look to the written explanations given by the supervisor as to the reason for firing. Beard quit

partially in response to the stress he felt at the job and in accordance with medical advice. [R. 215] However, there is no doubt that Beard's supervisors by mid-1986 felt that Beard's refusal to leave the matter of his allegations against his supervisor and follow employees alone was disruptive of the work situation in the Right-of-Way office. [R. 145] It was exactly these disruptive activities at the work place that caused DOT to be concerned that work wasn't getting done. By that point, the issues were not, as Beard contends, matters of public concern--they had been investigated and, except in a few particulars, all fellow employees accused by Beard of misconduct had been exonerated. Because he was basically accusing six of his co-workers of being criminals, it is not hard to see why these accusations were seen as disruptive. Beard was repeatedly told to keep his accusations to himself in the workplace, absent any new evidence. [R. 62-75] He could not do this and got repeated warnings from his supervisors to stop. [R. 17, 145] The court properly held that this did not rise to the level of matters of public concern.

IN THE SUPREME COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,)
Appellant,)
v.)
DAN BAUM, HAROLD A. CAMERON,)
SHARON McLEOD, WILLIAM B.)
McMULLEN, STEPHEN C. SISK,)
and CAROLINE C. VENUSTI)
individually and as employees)
of the STATE OF ALASKA; and)
THE STATE OF ALASKA,)
Appellees.)
)

Supreme Court No. S-3229

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA,
FOURTH JUDICIAL DISTRICT
JAY HODGES, JUDGE

REPLY BRIEF OF APPELLANT

LAW OFFICE OF THOMAS R. WICKWIRE
3700 University Avenue South
Fairbanks, Alaska 99709
474-0068
Attorney for Appellant
/s/
THOMAS R. WICKWIRE

FILED in the Supreme Court
of the State of Alaska,
this 7th day of August, 1989.

CLERK OF THE COURT

By: /s/
Deputy Clerk

Ex. 2

It stretches "everyone is presumed to know the law" too far.

The Superior Court should have allowed Beard a fair chance to reach the merits of his intentional infliction of emotional distress and wrongful constructive termination claims. Its dismissal was not on the merits, so he has never had one due process hearing on these claims, though he tried diligently with both APEA and the Court.

II. The Section 1983 Claims

Beard concedes the State and its officials acting in their official capacities are immune from suit for 42 U.S.C. Section 1983 violations because they are not "persons."

CONCLUSION

> But you have neglected the more important matters of the law--justice, mercy and faithfulness. . . . You strain out a gnat but swallow a camel. Matthew 23:23-24 (NIV)

Kenneth Culp Davis wrote Discretionary Justice in 1969 (University of Illinois Press 1971). With the theme that there is a need to replace broad discretion which the courts have in some areas with more rules so more cases are decided on their merits and with better

consistency. He specifically criticized the procedural defenses available to the government when defending civil cases as not worth their cost in money and injustice caused when the merits of a case are never reached. Professor Davis wrote:

> The intricacies of the technical remedies have grown. the need for litigating them

The law already recognizes the employee's property and liberty interests and the State's pay and promotion by merit, not by politics or favoritism, interests in public employment. The taxpayers and those affected by the efficiency and effectiveness of D.O.T. have an interest against funding the year or so long effort required to make a paper trail of progressive discipline. During this time the supervisor's interest is furthered if he can induce the target employee to make mistakes which can be used use in poor evaluations. The aw encourages clever manipulation of the system if it can close off an inquiry into the truth behind the accusations.

For these reasons, the summary judgment should be reversed and the case remanded for trial on Beard's claims of intentional

infliction of emotional distress, wrongful constructive termination and defamation.

Respectfully submitted,
/s/
Thomas P. Wickwire
Attorney for Appellant

CERTIFICATE OF SERVICE
The undersigned hereby certifies that on the 7th day of August 1989, a true and correct copy of the foregoing was served by mail on: R. Funk; C. Riley

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,)
Plaintiff(s),)
v.)
DAN BAUM, et al.,)
Defendant(s).)
)

No. 4FA-87-369 Civil

SPECIAL VERDICT

We the Jury in the above-entitled case find by agreement of ten (10) or more of our members, the following on questions submitted to us.

Q. 1. Did Mr. Beard's supervisors and other Department of Transportation employees acting together or separately make Mr. Beard's job intolerable?

Yes (answer yes or no)

Q. 2. Did Mr. Beard resign because his job had become intolerable by reason of the acts of his supervisors and other employees?

Yes (answer yes or no)

If your answer is "yes" to both question 1 and 2, answer question 3. If your answer is

"no" to either question 1 or 2, skip question 3 and go to question 4.

Ex. 3

Q. 3. After subtracting any sums which should be deducted according to the instructions I gave you, what is the total amount of earnings and benefits lost by Mr. Beard as a result of the breach of his contract?

$ 696,571.00

Q. 4. Did any of the individual defendant intentionally inflict emotional distress on Mr. Beard?

Yes (answer yes or no)

If your answer to question 4 is yes, answer question 5. If your answer to question 4 is "no" skip question 5 and go to question 6.

Q. 5. What amount of money will fairly compensate Mr. Beard for intentional infliction of emotional harm by each of the following defendants. (It need not, but may, be all of them.)

William McMullen	$1000.00
Harold Cameron	$1000.00
Sharon McLeod	$ -0-

Daniel Baum $ -0-

Caroline Venusti $1000.00

Q. 6. Did any of the individual defendants, while exercising the power or authority of their office, retaliate against Mr. Beard by causing harm to him for reporting or speaking out on possible

Wrongdoing by his co-workers or supervisors as set forth in Instructions 24, 25?

Yes (answer yes or no)

If your answer to question 6 is "yes" answer question 7. If your answer to question 6 is "no" skip question 7 and go to question 8.

Q. 7. What amount of money will fairly compensate Mr. Beard, for retaliation against him for speaking out on free speech issues, by the following individual defendants? (It need not, but may be all of them.)

William McMullen $ -0-

Harold Cameron $ -0-

Sharon McLeod $ -0-

Daniel Baum $ -0-

Caroline Venusti $ -0-

Q. 8. Do you find that either one or more of the individual defendants' actions was the type of wrongdoing as to warrant an award of money damages solely to punish them?

Yes (answer yes or no)

If so, what amount for each individual defendant?

William McMullen	$70,000.00
Harold Cameron	$45,000.00
Sharon McLeod	$1,000.00
Daniel Baum	$ -0-
Caroline Venusti	$45,000.00

DATED at Fairbanks, Alaska this 29th day of July, 1991.

/s/
Rene Moore, Foreperson

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, CAROLINE VENUSTI and WILLIAM McMULLEN,	)
Appellants,	)
v.	)
BURLE B. BEARD,	) Appellate Court No. S-6387
Appellee.	) Trial Court No. 4FA-87-369

RESPONSE TO PETITION FOR REHEARING

Beard's Petition for Rehearing claims that the court has overlooked a controlling legal principle: exhaustion of administrative remedies is not a prerequisite to bringing a civil rights claim. He then asks the court to merge the IIED verdict with his civil rights verdict. The Appellants Venusti and McMullen oppose the granting of rehearing.

I. The argument was not raised in *Beard III* or *Beard II*, and was explicitly waived in *Beard I*

Beard acknowledges that he did not list the principle as a point on appeal and did not brief the issue in either *Leard II* or *Beard III*. (Petition for Rehearing at 2, n.1) However, he seeks to excuse his failure to raise and argue what he terms a "controlling

issue of law" by showing that he at least raised the issue in his 1989 *Beard I* brief. (*Id.*) It is more correct to say that he *raised* and then specifically *waived* the argument in *Beard I*.

The state and its employees argued in their brief in *Beard I* that the state and state officials were not subject to suit under 42 U.S.C. § 1983. (Ex. 1) Beard's Reply Brief specifically conceded the point in a one-sentence reply and did not even discuss the individual capacities of the employees. (Ex. 2 at 11) Because his suit only involved actions taken by Venusti or McMullen in their official capacities, his abandonment of any constitutional claims was underscored in the summary of his request for relief:

> For these reasons the summary judgment should be reversed and the case remanded for trial on Beard's claims of intentional infliction of emotional distress, wrongful constructive termination and defamation. (Ex. 2 at 14)

The present petition for rehearing is based on a principle that was explicitly waived in earlier proceedings, and subsequently waived

by not being raised at repeated opportunities to do so.

II. The parameters of the "controlling principle" are not so well set that the issue is plain error

Because Beard did not raise the argument in *Beard III* or *Beard II*, and waived it in *Beard I*, his petition for rehearing concludes with the request that the court consider whether its failure to *sua sponte* invoke *Patsy* is plain error.[9] (Petition at 5)

Patsy v. Board of Regents, 457 U.S. 496, 102 S.Ct. 2557 (1982) was an employment case involving race-based discrimination. The court held, based on the historical suspicion of state hostility to enforcement of federal civil rights, that the exhaustion of *state* remedies was not be required as a condition to bringing a civil rights action in *federal* court.

In 1988 the United States Supreme Court considered the unprovoked beating of a black

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[9]The state's attorney in *Beard II* and *Beard III* was not involved in the briefing in *Beard I*, and just like Beard's counsel, the trial court, and the Supreme Court, did not see the issue now claimed to be plain error on rehearing. The state's attorney did not violate any ethical standards.

man by white police officers, and the victim's failure to comply with a state administrative claims procedure. The court held that for that claim the failure to exhaust state administrative remedies would not be a bar to bringing a civil rights claim in a state court. *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302 (1988).

Subsequent to *Felder*, the Alaska Supreme Court issued opinions in 1988 and 1990 in cases raising constitutional claims but <u>not</u> based on race and held the constitutional claims were subject to review by available administrative remedies. *Kollodge v. State*, 757 P.2d 1028, 1033(Alaska 1988) n.4; *Ben Lomond, Inc. V. Anchorage*, 761 P.2d 119, 122 (Alaska 1988) (Compton, J.); *Beard v. Baum*, 796 P.2d 1344 (Alaska 1990) (*Beard I*). In *Ben Lomand* the court cited Professor Davis to support its holding that:

> We believe that requiring exhaustion is particularly appropriate where a complainant raises both constitutional and non-constitutional issues. . . . [S]uccessful pursuit of a claim through the administrative process could obviate the need for judicial review of the constitutional issues.

761 P.2d at 122.

After *Beard I* established the law of the case for the present controversy, the court issued *Diedrich v. City of Ketchikan*, 805 P.2d 362 (Alaska 1991). *Diedrich* did not involve claims of free speech or any disciplinary action, but alleged violation of due process in his city employment termination. *Diedrich*, 805 P.2d at 364-5. Relying on *Patsy* and *Felder*, the court held that federal law permitted the filing of a § 1983 suit without exhaustion of administrative remedies. *Id.* at 368.

Since *Diedrich*, the United States Supreme Court clarified that the government employer must have latitude to suppress employee speech and must be permitted to utilize administrative review processes which do not afford the same procedural rules available in judicial forums so long as the procedures are reasonable. *Waters v. Churchill*, 511 U.S. 661, 667-669, 114 S.Ct. 1878, 1888-1889 (1994). The court declared that "Even if [the subject speech] was speech on a matter of public concern...the potential disruptiveness of the speech as reported was enough to outweigh

whatever First Amendment value it may have had." *Id.* at 667-668, 1890.

After *Diedrich* the Alaska Supreme Court issued two opinions which recognized that in government employment cases involving disruptive speech but not racial discrimination that exhaustion of administrative remedies was required even when constitutional claims are made. The first was *Cameron v. Beard*, 864 P.2d 538 (Alaska 1993) (*Beard II*), which held that supervisory conduct limiting employee speech is a matter that must be resolved through the union grievance process. Following *Waters* the court considered *Voigt v. Snowden*, 923 P.2d 778, 781 (Alaska 1996), which also did not involve allegations of racial discrimination but which presented constitutional claims. The court affirmed the dismissal of the complaint for the failure to exhaust administrative remedies. It found significant that a comprehensive grievance process was provided as part of the employment contract. *Id.* at 781, n.3.

For Beard to show plain error in *Beard III* in 1997 he must also conclude that the court committed plain error in *Ben Lomond* in

1988, *Kollodge* in 1988, *Beard II* in 1993 and *Voigt* in 1996. The "controlling rule of law" claimed in Beard's petition actually appears contrary to his cause. The actual rule appears to be that a state government employee, without claims of race-based discrimination and with an available grievance process, may not circumvent the grievance process by simply claiming official discipline is a violation of his free speech. The "controlling legal principle" at a minimum is not so clear or controlling or certain that it can be said the court committed plain error by failing to raise the issue *sua sponte*.

III. Merging IIED and Civil Right verdicts

Beard, in his request to merge two verdicts, does not allege error below or plain error on appeal, but asks the court to create a remedy which he never earlier sought. The failure to merge was not only <u>not</u> plain error, but there is absolutely no authority for the court to rewrite the verdict. Beard's request, never before raised at any level, without any authority, and without any identification of overlooked legal principle, must be denied.

The jury awarded no damages for Beard's free speech claim, not even nominal damages.

(Ex. 3) Beard did not appeal that finding in *Beard II*. He had not asked the trial court to have the jury distinguish between IIED punitive damages and free speech punitive damages in the verdict, even though the defendants had been promised a hearing on exhaustion. If he wanted to protect any civil rights verdict from merging with the common law tort claims he had an opportunity to do so. The failure to distinguish between the claims was not plain error. If his petition as to exhaustion is granted and then a decision is made that he was excused as to his § 1983 claim, (and if other issues, below, are resolved in his favor) the result must be limited to the reinstatement of the zero verdicts and then possibly to remand for a trial on punitive damages. To do anything else would be to re-write the verdict.

Upon remand of *Beard I*, Beard focused on the exhaustion facts and made strategic decisions that he now wishes to undo. There has been no citation to overlooked law or facts. Given the jury verdict of no damages, denying the petition for rehearing will not work an injustice. There has been no identification of overlooked legal principles

or argument. The petition to merge on rehearing must be denied.

IV. Other issues

If the free speech cause of action is reinstated then Venusti and McMullen ask that the court then consider their other appeal points which were not reached by the current decision. Their Civil Rule 60(b) claim is especially compelling in light of how the trial was tainted by litigation of all the other unauthorized constructive discharge and IIED claims.

V. Conclusion

The matter raised in the petition was explicitly waived in *Beard I*, and then was neither preserved nor briefed at multiple opportunities thereafter. There was no plain error. The petition for rehearing should be denied.

Dated: January 29, 1998

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: /s/
Randy M. Olsen
Assistant Attorney General
ABA # 7710147

This is to certify that on the 29 day of January 1998 a copy of the foregoing is being mailed to the following attorneys or parties of record:

Thomas Wickwire, 3730 University Ave. So.
Fairbanks, AK 99709

/s/
Judith A. Smith

CERTIFICATE OF COMPLIANCE

Pursuant to Alaska R. App. P. 513.5, I certify that the preceding document is printed in 13 point Times New Roman.

Judith A. Smith

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, CAROLINE VENUSTI and WILLIAM McMULLEN,

Appellants and Cross-Appellees,

v.

BURLE B. BEARD,

Appellee and Cross-Appellant.

Superior Court No. 4FA-87-369 CI
Supreme Court Case Nos. S-6378/6438

PETITION FOR REHEARING

Appellee Beard petitions for rehearing on the ground that the Court has overlooked a directly controlling decision, Patsy v. Board of Regents, 457 U.S. 496, 73 L.Ed.2d 172 (1982), Appellate Rule 506(a)(1), or overlooked a material proposition of law, Appellate Rule 506(a)(2): federal law governs and limits the state defenses to 42 U.S.C. § 1983 claims.

I. The 42 U.S.C. § 1983 claims were not subject to state exhaustion requirements.

Section 1983 plaintiffs are not required to exhaust administrative remedies. Patsy v. Board of Regents, 457 U.S. 496, 73 L.Ed.2d 172 (1982), followed in Alaska in State, Dept. of Health & Soc. Services v. ASHNHA, 856 P.2d 755, 758 (Alaska 1993), and Diedrich v. City of Ketchikan, 805 P.2d 362 (Alaska 1991). In

Diedrich, this Court quoted from Felder v. Casey, 487 U.S. 131, 101 L.Ed.2d 123 (1988), that states are not permitted to place conditions on the vindication of a federal right, 805 P.2d at 368. This Court also stated, id. at 369, note 13,

"Felder appears to have settled this issue conclusively."[10]

In their treatise, Schwartz and Kirklin collect the reasons why Congress never intended for § 1983 actions to be subject to state administrative exhaustion requirements. One reason was Congress' mistrust for the fact

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[10]Beard cited Patsy in his opening brief, p. 31, in Beard I for this point. The Court ruled in favor of Beard on the alternative futility issue and adhered to that holding until its decision of Beard II. Beard did not cite Patsy in his Beard II brief because there he took the position that Beard I had resolved the exhaustion issue in his favor. From the Beard II decision to the end of the remand proceedings in Superior Court, Beard and the Superior Court followed the remand instructions, held the evidentiary hearing and got a decision that Beard prevailed on the facts at issue.

When Defendants appealed that decision, Beard did not cite Patsy again, as an alternative ground for affirming. In hindsight, that oversight is quite apparent. Counsel apologizes for his part in causing the Court to miss this proposition.

finding processes of state institutions and its belief that the federal courts would be less susceptible to local prejudice and to the existing defects in the fact finding processes of the state courts.[11] Beard's claims, having been proven to a jury, are better examples of this than most cases cited for this, which involve yet to be proven claims.

The rule that § 1983 claimants are not subject to state exhaustion requirements is long standing, consistently applied and subject only to well settled exceptions.

The other recognized treatise on § 1983, Nahmod,[12] states that the Supreme Court has consistently followed the no-exhaustion of state administrative remedies rule since 1974,[13] before pronouncing the rule in unequivocal terms in Patsy (1982).

Counsel has not found a case directly on point, but it appears the point is clearly

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[11]Schwartz & Kirklin, Section 1983 Litigation. Claims and Defenses, § 10.3, p. 560 (3d ed.)

[12]Nahmod, Civil Rights and Civil Liberties Litigation, The Law of Section 1983 (3d ed.) § 9.12.

[13]Steffel v. Thompson, 415 U.S. 452, 472-73 (1974).

established and has supremacy so as to be p, particularly if a state court applied state administrative exhaustion requirements to vacate a § 1983 judgment that had been reviewed on appeal and found otherwise error free. Brown v. Western Railway, 338 U.S. 294 (1949), and Felder v. Casey, id., appear to indicate that state pleading rules cannot be applied to preclude a § 1983 claim if the claim would not be subject to such a rule in federal court.[14]

Note 6 of the majority opinion in this case, Slip Opinion at 18, distinguishes claims against the State from claims against individual defendants for the purpose of deciding whether all were covered by the grievance procedure. However, the opinion does not address which claims are § 1983 claims and which are state law only claims. This distinction becomes important only with the new decision because, during the time that futility was established, failure to exhaust was not a bar to either state law or § 1983 claims. The briefs in Beard III did not

---

[14]1 Nahmod, § 1.14, p. 53-54.

separate the § 1983 claims from the state law claims.[15]

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[15]Beard's attorney fee motion memorandum was reviewed for this point. The distinction was not important there because the attorney fees under 42 U.S.C. § 1988 or Civil Rule 82 were nearly identical in amount.

Defendants may fault Beard's counsel for failing to raise this point below. But, Beard prevailed below on the futility issue, so did not challenge it on other grounds or argue with the Superior Court on whether it should consider it at all. Beard would have been stretching the limits of advocacy to urge the Superior Court to disobey the remand instructions and not conduct the review hearing because of Patsy or any other authorities. Beard had a duty to follow the remand instructions.[16]

II. The IIED claims are § 1983 claims

Prior to trial, the parties disputed whether Beard must prove that the employer's motive for creating the constructive discharge

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[16]Defendants, if aware of these cases, had a duty to bring Patsy or Felder v. Casey, or either of the Alaska cases which cited them, to the Court's attention. Rules of Professional Conduct 3.3 provides:

> **Candor Toward the Tribunal**
> (a) A lawyer shall not knowingly:
> . . . .
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

environment was to deny Beard his Free Speech rights. Beard contended proof of motive was not part of his burden, even though all the evidence pointed toward intent to retaliate for his Free speech. Proving this intent was unimportant because individuals and municipalities, but not states, can be liable for § 1983 claims.

This Court agreed that beard has no such burden to prove the employer's specific intent. Beard II, 864 P.2d at 547. The jury was not asked to decide whether any of Beard's proven
claims were motivated by something other than retaliation for speaking out on protected Free Speech issues, which they found. Also, it is apparent from this Court's review of the facts in Beard II, 864 P.2d at 548, that there was no evidence of any other motive for either he constructive termination acts or the IIED acts. Defendants merely contended they did not do it.

After finding constructive termination, the jury found the defendants liable for emotional distress (Verdict, Q.5), then found that they harmed Beard by use of state power for his speaking out on possible wrongdoing by

co-workers or supervisors (Verdict, Q.6) and that four of the five individual defendants' wrongdoing was sufficiently egregious to warrant punitive damages. These answers show the jury found that the IIED acts were done as retaliation for Beard's Free Speech complaints. The Defendants contended that the defendants did not do the tortious acts, not that there was a non-§ 1983 motive for them, so once proven, they establish § 1983 claims.

Beard requests the Court to grant rehearing and modify its decision to follow Patsy, Felder and Diedrich and hold that Beard was not required to exhaust administrative remedies for his IIED claims because they were 42 U.S.C. § 1983 claims, as they were motivated by Defendants' retaliation for Beard's Free Speech whistleblowing. They were pleaded as such, instructed to and found by the jury as such. Beard asks the Court to consider whether its failure to address the Patsy and Felder rules was plain error and to correct it.

DATED: 2 December 1997

/s/
Thomas R. Wickwire
Attorney for Burle B. Beard
ABA #7111049

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, et al., Petitioner,	)	
v.	)	Supreme Court - S-06378
BURLE B. BEARD, Respondent.	)	**ORDER** Petition for Rehearing
Trial Court Case #4FA-87-00369 CI	)	Date of Order: 5/29/98

Before: Matthews, Chief Justice, Compton, Eastaugh, Justices, and Rabinowitz, Senior Justice[*] [Fabe and Bryner, Justices, not participating.]

On consideration of the Petition for Rehearing filed on **December 2, 1997**, and the response filed on **January 29, 1998**.

IT IS ORDERED:

1. The Petition for Rehearing is **DENIED** because Beard is deemed to have waived the argument, raised for the first time in his petition, that the exhaustion doctrine cannot bar a claim under 42 U.S.C. § 1983.

---

[*]Sitting by assignment under article IV, section 11, of the Alaska Constitution and Alaska Administrative Rule 23(a).

2. Opinion No. 4913, issued on November 28, 1997, is **WITHDRAWN** and Opinion No. 4996 is issued in its place on today. Part III.A.4 contains changes. The opinion is otherwise unchanged

Entered by the direction of the court.

Clerk of the Appellate Courts

/s/
Cheryl Jones, Deputy Clerk

COMPTON, Justice dissents. He would grant the petition.

(3)

Supreme Court, U.S.
FILED
OCT 9 1998
OFFICE OF THE CLERK

No. 98-351

In The

Supreme Court of the United States

October Term, 1998

BURLE B. BEARD,

Petitioner,

v.

DAN BAUM, HAROLD CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN C. SISK, CAROLINE VENUSTI, and the STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The Alaska Supreme Court

REPLY BRIEF OF PETITIONER

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STATUTES AND RULES

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STATEMENT OF THE CASE

Respondents' statement of facts argue part of the evidence submitted to the jury in a three week trial which found against them and was affirmed by *Beard II*. Respondents were allowed to put Beard's diary entries into evidence and argue the same lack of causation theories they argue here. The jury did not believe that version and the Alaska Supreme Court affirmed those findings, with minor exceptions noted in Beard's Certiorari Petition.

Respondents were also allowed to argue to the jury that Beard is unpopular or unlikable because he writes off-color jokes in his diaries. There was no evidence that Beard repeated any of these to anyone ever and, specifically, to anyone at work. The jury evidently did not think they were relevant. Respondents included these same diary entries in its brief to the Alaska Supreme Court in *Beard II*. The Alaska Supreme Court either ignored them or considered them irrelevant to the legal challenges to the jury verdict when it affirmed on the facts in *Beard II*. Beard is uncertain why Respondents include these in their appendix to this Court. Perhaps it is to make the point that it is only the unpopular or weak that need the First Amendment.

Respondents' App. 13 through 28 is the in-house investigation which Beard called a "whitewash" to his boss, and was threatened for doing so; he called it a whitewash at trial and the jury evidently agreed.[1] The Alaska Supreme Court found the jury entitled to believe that Respondents retaliated against Beard for calling this

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[1] *Beard II*, 864 P.2d 538, 543. Cert. Petition App. 86-87.

investigation a whitewash. *Id.* Beard does not believe further reference to it gives it any greater probative value or supports Respondents here.

Respondents' contention that Beard's criticisms, and his attempts to get his allegations of wrongdoing investigated were disruptive, was tried, failed, and the lack of evidence was affirmed in *Beard II*.[2]

Respondent McMullen's behind-the-scenes efforts to collect evidence of disruptive activity by Beard was also found to be outrageous conduct, so as to support the jury finding of intentional infliction of emotional distress against McMullen.[3]

Respondents assert that Beard has never by testimony or affidavit challenged Senkow's testimony. Respondents' Br. 12, n. 5. That is correct. Respondents know the reason: at the start of the evidentiary hearing on the futility of exhaustion issue, Beard's counsel explained why Beard was not in attendance and asked the State and these respondents to agree that Mr. Beard's testimony would not be needed. The State and Respondents here agreed. The exchange was:

THE COURT: Well, you want to call your first witness?

MR. WICKWIRE: First, Your Honor, may I . . .

THE COURT: Mr. Wickwire?

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[2] *Id.* at 543, n.6. Cert. Petition App. 88.

[3] *Beard II*, 864 P.2d 538, 549. Cert. Petition App. 101-03.

MR. WICKWIRE: . . . address a procedure point? At the time this hearing was set, I assumed that I'd be able to get ahold of my client. I hadn't been able to. He's been traveling in a camper vehicle down south. He calls in about every week to ten day normally, but since this – at the time this hearing was set until now, he hasn't called in. So I have been unable to get him. Late last week I called Mr. Olsen and purpose of my discussion was that I didn't want to go over this hearing if there was going to be any new statement or any new incident that Mr. Beard was going to be placed in as having said or did. Mr. Olsen assured that no, there wasn't any new statement or any new incident where Mr. Beard's conduct was going to be – in evidence that was going to be something new today. And with that representation, I didn't ask that this be rescheduled.

But if we're going to rehash everything else that's been done in the evidence, in the depositions and the trial and the motion papers, and it is with that condition that I am willing to proceed here. I certainly don't want a decision to be made if there's anything new that is going to surprise me. That's what I tried to do last week.

MR. OLSEN: [State and Respondents' counsel]: Your Honor, and that's correct. We don't have any conversations that we're going to testify about that Mr. Beard hasn't had a chance to comment on.

THE COURT: Okay. Your first witness?

MR. OLSEN: Bruce Senkow, Your Honor.

App. 5-6.

Respondents state that on remand for the evidentiary hearing, "defendants obtained evidence from Senkow's deposition that the Senkow affidavit had been improperly used,. . . . " Respondents' Br. 9. The evidence on this was that, shortly after the briefing was completed in *Beard I*, so before the trial and evidentiary hearing on exhaustion, the State hired Senkow into Respondent Venusti's position at substantially higher pay, then deposed him.

The timing of the State's hiring Senkow, and his wife, was set out with transcript cites in Beard's *Brief of Appellee* in *Beard III*, which stated:

SENKOW'S INTERESTS

> By the time of Senkow's deposition and trial testimony, he had been hired into Venusti's former job at DOT. (Tr. 1542-43) Senkow had his eye on Venusti's job as DOT Personnel Officer "for a long time" (Tr. 1542), and worked as her subordinate for a year before she decided to retire (Tr. 1542), which happened in approximately November 1990 (three months before Senkow's February 1991 deposition). (Tr. 1542) Thus, the State hired Senkow in Fall 1989. The briefs in *Beard I* were filed in Summer 1989.
>
> DOT hired Senkow's wife, also during the pendency of this litigation, after he was hired by DOT. (Tr. 1790) Their DOT salaries are substantially all of their income. (Tr. 1789)
>
> Senkow said that before signing his affidavit, Identification Exhibit 67, he read it and believed it was accurate. (Tr. 1793)

App. 2-3, 6-9.

The trial court heard this evidence again, App. 6-9, before finding that Beard had established the futility of making additional requests to his then union representative, Senkow, to grieve the constructive discharge pattern. Cert. Petition App. 36-37. Thus, Beard did not "improperly" use Senkow's affidavit; he contended that his attempt to discredit his own affidavit was motivated by his new loyalty to the State and Respondents and his financial interest in his and his wife's DOT employment.

Respondents contend Beard abandoned the constitutional claims in his *Reply Brief of Appellant* in *Beard I*. Respondents' Br. 8, 17, 20. This is contrary to the *Beard I* opinion which discussed the elements and proof needed on Beard's § 1983 claims and remanded them for trial. The Superior Court instructed the jury on their elements and the jury returned verdicts on them, which were affirmed in *Beard II*.

Beard's statement in his *Beard I* reply brief conceded only that " . . . the state and its officials *acting in their official capacities* are immune from suit for 42 U.S.C. Section 1983 violations because they are not 'persons.' " [Emphasis added.]

The sentence in Beard's reply brief in *Beard I* was in response to and agreed with Respondents' statement of the holding in *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), in its *Beard I* appellee brief, found in Respondents' App. 30-31.

Respondents fault Beard for not including the "no exhaustion required for § 1983 claims" as a point on

appeal in *Beard III*, in 1997.[4] Beard was appellee in *Beard III*, so, under Alaska's appellate rules, appellees do not select or state points on appeal. That is for the appellants. Alaska R. App. Proc. 204(e).

OMISSIONS FROM RESPONDENTS' APPENDIX

Respondents' App. 38 purports to set out verbatim the *Conclusion* portion of Beard's reply brief in *Beard I*. Two full pages of that brief have been omitted from this appendix, without an ellipsis or other indication of an omission. The entire conclusion is reproduced at App. 11-14.

Respondents' App. 42 has omitted the jury's handwritten note opposite question 7 of the jury verdict, which states: "No amount of money could fairly compensate Mr. Beard for loosing (sic) his freedom of speech."

Respectfully submitted,

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[4] The 1997 date is incorrect. It should state 1994.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

BURLE B. BEARD,)
Plaintiff,)
vs.)
DAN BAUM, et al.,)
Defendant.)

Case No. 4FA-87-369 Civil

VOLUME IX

TRANSCRIPT OF TRIAL BY JURY,
CONTINUED (EXCERPT)

Wednesday, July 24, 1991, 8:15 a.m.

ARGUMENT ON JURY INSTRUCTIONS

Wednesday, July 24, 1991, 2:54 p.m.

TRANSCRIPT OF TRIAL BY JURY,
CONTINUED (EXCERPT)

Thursday, July 25, 1991, 8:24 a.m.

VERDICT RETURN (EXCERPTS)

Monday, July 29, 1991, 12:29 p.m.

HEARING ON MOTIONS

Monday, November 25, 1991, 2:27 p.m.

Fairbanks, Alaska

Cross-Examination of Bruce Senkow by Mr. Wickwire

* * *

[p. 1542] this job for a long time.

Q All right. Well, that was three years before you actually left that job and became the Personnel officer of the DOT, right?

A Yes, it was.

(Tape changed)

4FAB-2071

Q And you'd met Caroline Venusti in your meetings and going through the evaluation – or investigation process, the appeal process, I'll call it, right?

A Yes, I did.

Q So you learned that she was going to retire and you applied for her job when it came open, right?

A No, I took a – actually a demotion and went to work for the State in the Division of Personnel, Department of Administration several years prior to Caroline Venusti's retirement or even hinting of retirement. I then took a lateral transfer and went into the Personnel office in DOT and worked there for, I don't know, a year or sometime before Caroline decided to retire. I don't think anybody had any idea that Caroline was definitely going to retire; but I mean, it was going to happen, and I was willing to put my place where I had the best chance for that job.

Q Does that job pay more than you were making as an APEA [p. 1543] rep?

A No, it doesn't.

Q All right.

A No.

Q And does it have better benefits or better advancement opportunities?

A No, it's less stressful.

Q Your boss is John Horn, right?

A Currently.

Q And is that position he is in the same position that William McMullen was in five years ago?

A No. Bill McMullen was the Director of Design and Construction. He wasn't Regional Director at the time.

Q All right. You said in answer to Mr. Olsen's questions that you didn't believe your testimony here could influence your position at DOT, right?

A I don't feel it will.

Q So do you believe the results of this case cannot restrict or cause or force the Department of Transportation to change their ways of doing things?

A That doesn't – I mean – the results of this case? I mean, I – Randy Olsen's question to me was will it affect my job, I believe, or something, and I don't think this case will have an affect [sic] on my job or my testimony.

* * *

App. 4

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,

Plaintiff,

vs.

DAN BAUM, HAROLD A. CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN C. SISK, and CAROLINE C. VENUSTI, individually and as employees of the STATE OF ALASKA; and THE STATE OF ALASKA,

Defendants.

Cause No. 4FA-87-369 Civil

VOLUME XI

April 11, 1994 – Pages 1772 through 1895

TRANSCRIPT OF EVIDENTIARY HEARING

BEFORE THE HONORABLE JAY HODGES
Superior Court Judge

Fairbanks, Alaska
April 11, 1994
9:00 o'clock a.m.

APPEARANCES:

FOR THE PLAINTIFF: THOMAS R. WICKWIRE
Attorney at Law
3730 University Avenue South
Fairbanks, Alaska 99709

FOR THE DEFENDANTS: RANDY M. OLSEN
Office of the Attorney General
100 Cushman Street, Suite 400
Fairbanks, Alaska 99701

* * *

[p. 1774] THE COURT: Well, you want to call your first witness?

MR. WICKWIRE: First, Your Honor, may I. . . .

THE COURT: Mr. Wickwire?

MR. WICKWIRE: . . . . address a procedure point? At the time this hearing was set, I assumed that I'd be able to get a hold of my client. I hadn't been able to. He's been traveling in a camper vehicle down south. He calls in about every week to ten day normally, but since this – at the time this hearing was set until now, he hasn't called in. So I have been unable to get him. Late last week I called Mr. Olsen and purpose of my [p. 1775] discussion was that I didn't want to go over this hearing if there was going to be any new statement or any new incident that Mr. Beard was going to be placed in as having said or did. Mr. Olsen assured that no, there wasn't any new statement or any new incident where Mr. Beard's conduct was going to be – in evidence that was going to be

something new today. And with that representation, I didn't ask that this be rescheduled.

But if we're going to rehash everything else that's been done in the evidence, in the depositions and the trial and the motion papers, and it is with that condition that I am willing to proceed here. I certainly don't want a decision to be made if there's anything new that is going to surprise me. That's what I tried to do last week.

MR. OLSEN: Your Honor, and that's correct. We don't have any conversations that we're going to testify about that Mr. Beard hasn't had a chance to comment on

THE COURT: Okay. Your first witness?

MR. OLSEN: Bruce Senkow, Your Honor.

* * *

[p. 1789] Q You said your DOT employment will not affect your testimony here today?

A No, I don't believe it will.

Q Okay. Did your wife also work for DOT?

A She does now. She was laid off and she got picked up by virtue of the lay-off rights.

Q But is all of your income, your family income from DOT employment?

A Currently.

Q So between you and your wife, that is substantial, without asking you to pin it down; right?

A I believe that's true. I don't think many people know my wife works at DOT though. She uses her own

maiden name, so I know there are a lot of people that even deal with me directly that don't know she works there.

Q Very well. But between you and your wife, all of your income. . . .

A Right.

Q . . . . comes from DOT, and it is substantial between the two of you.

A Yeah. I would say it's doing okay.

Q And as personnel officer at DOT, you're familiar with the personnel rules that apply to whether or not both husband [p. 1790] and wife can work at DOT?

A True.

Q Miss Venusti (ph) and her husband had also both worked for DOT; right?

A There are many couples that work at DOT.

MR. OLSEN: Your honor, I think we've got this point made that they're both employed. . . .

THE COURT: The objection is overruled.

Q (By Mr. Wickwire) Did you find out that it was possible for both you and your wife to work there by getting advice from Miss Venusti how she did it?

A No, no. I didn't talk to Miss Venusti about my wife's employment at all. My wife came substantially later after I was hired. In fact, she had to accept the job or lose her lay-off rights. She was laid off from corrections. She had no choice. In fact, she preferred not to work at DOT. So she had to take that or have no employment.

Q Considering your affidavit that you wrote, signed in November of '87 – correction, May of '87.

A Correct.

Q Mr. Beard left the employment in August of '86; right?

A I believe that was – Yeah.

Q And so by May of '87, litigation was already started by the State?

A I wasn't really aware of litigation starting at that point.

* * *

[p. 1793] A I said, Yes, I read it and signed it, believed it was fairly accurate.

Q So now you're saying that it's not accurate; right?

A I haven't said – as I said earlier in my testimony, I explained the issues in number 4 about what I felt was – those were from my perspective. If I had prepared that affidavit and knew what it was for, it wouldn't have come out reading like that. That was fairly wishy-washy. It doesn't say anything about, you know – again, I still think it's fairly accurate for what purpose it served, but it wouldn't have been something I would have written that way.

Q Well, but you read it and you signed it, knowing it's an affidavit which means it's under-oath testimony; right?

A Again, I'm not saying that it's false. I'm just saying it's fairly wishy-washy and, yes, I could sign it.

Maybe that's why the first one – and I don't have the first affidavit. But that was the one that I had objections to and refused to sign that one.

Q Well, I don't want to read paragraph 4 again. We've been over it and over it. But I'd ask the Court that the words speak for themselves and they have their regular English meaning. Mr. Senkow, have you reviewed your depositions recently?

A No, I haven't.

MR. WICKWIRE: Does the Court have those?

* * *

IN THE SUPREME COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,

Appellant,

V.

DAN BAUM, HAROLD A. CAMERON, SHARON McLEOD, WILLIAM B. MCMULLEN, STEPHEN C. SISK, and CAROLINE C. VENUSTI individually and as employees of the STATE OF ALASKA; and THE STATE OF ALASKA,

Appellees.

Supreme Court Case No. S-3229

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA,
FOURTH JUDICIAL DISTRICT
JAY HODGES, JUDGE

REPLY BRIEF OF APPELLANT

LAW OFFICE OF THOMAS R. WICKWIRE
3700 University Avenue South
Fairbanks, Alaska 99709
474-0068
Attorney for Appellant

/s/ Thomas R. Wickwire
THOMAS R. WICKWIRE

FILED in the Supreme Court
of the State of Alaska
this 7th day of August, 1989.

CLERK OF THE COURT

By: /s/ Teresa High
DEPUTY CLERK

* * *

II. The Section 1983 Claims

Beard concedes the State and its officials acting in their official capacities are immune from suit for 42 U.S.C. Section 1983 violations because they are not "persons."

CONCLUSION

> But you have neglected the more important matters of the law – justice, mercy and faithfulness. . . . You strain out a gnat but swallow a camel. Matthew 23:23-24 (NIV)

Kenneth Culp Davis wrote *Discretionary Justice* in 1969 (University of Illinois Press 1971), with the theme that there is a need to replace broad discretion which the courts have in some areas with more rules so more cases are decided on their merits and with better consistency. He specifically criticized the procedural defenses available to the government when defending civil cases as not worth their cost in money and injustice caused when the merits of a case are never reached. Professor Davis wrote:

> The intricacies of the technical remedies have grown, the need for litigating them has increased correspondingly, and the intricacies

grow still further. Someone needs to find an escape from the vicious circle.

The needed escape, I think, has to be from the tendency of government lawyers, like any other lawyers, to use all available tricks to win for their client. That government lawyers use all legal and ethical means to win their cases is, of course, only natural. But I think they can and should rise to a slightly higher degree of sophistication. Uncle Sam is not an ordinary client. Uncle Same [sic] always wins when justice is done. This means he may lose when judgment is entered for him, and he may win when judgment is entered against him. That this is so is not merely an idealist's dream but a hard-headed reality. It has *sometimes* been the basis on which government lawyers have exercised their important discretionary power.

For instance, in *Ceballos v. Shaughnessy*, government lawyers made a concession on a point which they had won in both lower courts. Without the concession, they might have won a judgment in the Supreme Court, as they had in both lower courts. Because they made the concession, the Supreme Court entered judgment against them. They thought justice was thus done, and I agree.

Should not the spirit behind this concession more frequently actuate government lawyers?

What I am suggesting is that the role of government lawyers in defendant suits against the government does and should involve a semi-judicial function. Even when they can win by interposing a technical defense. I think that sometimes they should help the court to reach the merits. When their conscientious appraisal

> of a case leads them to believe that the chances are substantial that a court may find that the aggrieved party has suffered injustice at the hands of a government officer. I think they should refrain from interposing a technical defense unless the policy reasons behind the defense are strong as applied to the case. [Discretionary Justice, A Preliminary Inquiry, U. of Illinois Press 1971 at 160)]

Since litigation lawyers get absorbed in obtaining a remedy or protecting their client from a risk, the adversary system encourages them to learn the "tricks" of the law and use them to win. But that explanation is not a justification. It will take conscious effort by government defense lawyers to look to the merits first, when there is no practical need to do so until the procedural defenses have failed.

The procedural defenses succeeded in barring Beard from ever getting the merits of his intentional infliction of emotional distress and constructive termination (successful harassment) claims before a fact finder or in getting any contract remedy.

There is evidence suggesting that McMullen, a D.O.T. division director, knew that a paper record of progressive discipline must be made. That if he could induce or, failing that, accuse Beard of disrupting the work of himself and others with this dispute, but never allow him an opportunity to disprove this, he could wrongfully fire Beard or force him to quit. How much protection from the law should the courts give to such government supervisors?

The law already recognizes the employee's property and liberty interests and the State's pay and promotion by merit, not by politics or favoritism, interests in public employment. The taxpayers and those affected by the efficiency and effectiveness of D.O.T. have an interest against funding the year or so long effort required to make a paper trail of progressive discipline. During this time the supervisor's interest is furthered if he can induce the target employee to make mistakes which can be used in poor evaluations. The law encourages clever manipulation of the system if it can close off an inquiry into the truth behind the accusations.

For these reasons, the summary judgment should be reversed and the case remanded for trial on Beard's claims of intentional infliction of emotional distress, wrongful constructive termination and defamation.

Respectfully submitted,

/s/ Thomas R. Wickwire
Thomas R. Wickwire
Attorney for Appellant

IN THE SUPREME COURT FOR THE
STATE OF ALASKA

STATE OF ALASKA, CAROLINE VENUSTI and WILLIAM McMULLEN,	)
Appellants and Cross-Appellees,	)
v.	)
BURLE B. BEARD,	)
Appellee and Cross-Appellant.	)

Superior Court Case No. 4FA-87-369 Civil
Supreme Court Case No. S-6378
Supreme Court Case No. S-6438

APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

JAY HODGES, JUDGE

BRIEF OF APPELLEE

/s/ Thomas R. Wickwire
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ABA #7111049
Attorney for Cross Appellant

Filed December 21, 1994 in
the Supreme Court for the
State of Alaska

Jan Hansen, Clerk of
the Appellate Courts

By: /s/ Teresa High
Deputy Clerk

* * *

lawsuit be about if not about his supervisors' plan to fire him or drive him to quit? If Senkow knew Beard planned a lawsuit if fired or forced to quit, then he knew Beard's resignation was not voluntary.

Senkow said, as best he could recall, Beard did not tell him the stress was causing him physical pain (Tr. 1784), but when Beard would get talking about his supervisors' overall actions, Senkow would narrow him down to the one issue that Beard wanted grieved, (Tr. 1783), essentially getting him off this topic and back to a specific grievable act.

SENKOW'S INTERESTS

By the time of Senkow's deposition and trial testimony, he had been hired into Venusti's former job at DOT. (Tr. 1542-43) Senkow had his eye on Venusti's job as DOT Personnel Officer "for a long time" (Tr. 1542), and worked as her subordinate for a year before she decided to retire (Tr. 1542), which happened in approximately November 1990 (three months before Senkow's February 1991 deposition). (Tr. 1542) Thus, the State hired Senkow

in Fall 1989. The briefs in *Beard I* were filed in Summer 1989.

DOT hired Senkow's wife, also during the pendency of this litigation, after he was hired by DOT. (Tr. 1790) Their DOT salaries are substantially all of their income. (Tr. 1789)

Senkow said that before signing his affidavit, Identification Exhibit 67, he read it and believed it was accurate. (Tr. 1793)

* * *